(20)

No. 03-1388
Title: Douglas Spector, et al., Petitioners
v.
Norwegian Cruise Line Ltd.
Docketed: April 5, 2004
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (02-21154, 03-20056)
Decision Date: January 12, 2004
Rehearing Denied: February 10, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 1 2004	Petition for a writ of certiorari filed. (Response due May 5, 2004)
Apr 28 2004	Order extending time to file response to petition to and including July 6, 2004.
Jun 29 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent
Jul 1 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners
Jul 5 2004	Brief amici curiae of Paralyzed Veterans of America, et al. filed.
Jul 5 2004	Brief amicus curiae of International Council of Cruise Lines filed.
Jul 6 2004	Brief of respondent Norwegian Cruise Line Ltd. in opposition filed.
Jul 21 2004	DISTRIBUTED for Conference of September 27, 2004.
Jul 21 2004	Reply of petitioners Douglas Spector, et al. filed. Distributed.
Sep 28 2004	Petition GRANTED.
Nov 8 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 1, 2004.
Nov 8 2004	Extension of time within which to file respondent's brief on the merits to and including January 24, 2005.
Nov 9 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Nov 29 2004	Further extension of time within which to file the joint appendix and petitioners brief on the merits to and including December 3, 2004. Respondent's brief on the merits is to be filed on or before January 28, 2005.
Dec 3 2004	Brief amicus curiae of United States filed.
Dec 3 2004	Joint appendix filed.
Dec 3 2004	Brief of petitioners Douglas Spector, et al. filed.
Dec 3 2004	Brief amici curiae of Nine Associations Representing Persons with Disabilities filed.
Dec 3 2004	Brief amicus curiae of Jonathan M. Gutoff filed.
Dec 3 2004	Brief amici curiae of Paralyzed Veterans of America, et al. filed.
Dec 3 2004	Brief amici curiae of Texas, et al. filed. (Distributed)
Dec 15 2004	SET FOR ARGUMENT ON Monday, February 28, 2005.
Dec 16 2004	CIRCULATED.
Jan 18 2005	Record received from U.S.D.C.- Southern Dist. of Texas (1 box)
Jan 18 2005	Record received from U.S.D.C. - 5th Circuit. (1 box)

Jan 27 2005	Brief amicus curiae of Mediterranean Shipping Company Crociere, S.p.A. filed. (Distributed)
Jan 27 2005	Brief amici curiae of American Steamship Owners Mutual Protection and Indemnity Association, et al. filed. (Distributed)
Jan 27 2005	Brief amicus curiae of American Steamship Owners Mutual Protection and Indemnity Association, et al. filed. (Distributed)
Jan 27 2005	Brief amicus curiae of International Council of Cruise Lines filed. (Distributed)
Jan 28 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 28 2005	Brief of respondent Norwegian Cruise Line Ltd. filed.
Jan 28 2005	Brief amicus curiae of Chamber of Commerce of the United States filed. (Distributed)
Jan 28 2005	Brief amici curiae of Commonwealth of the Bahamas and the Bahama Maritime Authority filed. (Distributed)
Feb 1 2005	Motion of Commonwealth of the Bahamas and the Bahama Maritime Authority for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 18 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 18 2005	Motion of Commonwealth of the Bahamas and the Bahama Maritime Authority for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 18 2005	Reply of petitioners Douglas Spector, et al. filed. (Distributed)

(1)

Supreme Court, U.S.
FILED

No. 03-031388 APR 2004

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and to what extent Title III of the Americans with Disabilities Act applies to companies that operate foreign-flag cruise ships in United States waters?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Julia Hollenbeck, David T. Killough, Rodger Peters, and Ana Spector.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Douglas Spector, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-15a) is published at 356 F.3d 641. The district court's memorandum and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 16a-47a), dated September 9, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. The court of appeals denied rehearing en banc on February 10, 2004. See Pet. App. 48a-49a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix at 50a-74a.

STATEMENT

This is a case under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* Petitioners allege that respondent cruise line violated Title III by discriminating in the prices, access to public accommodations, and services offered to passengers with disabilities and their companions. Acknowledging that its decision squarely conflicted with the Eleventh Circuit, the Fifth Circuit held that petitioners could not pursue their claims because Title III does not apply to foreign-flag cruise ships and their operators.

1. The ADA establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The provisions of Title III, in particular, are "'a milestone on the

path to a more decent, tolerant, progressive society.'" *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (quoting *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). Title III also bars discrimination "on the basis of disability in the full and equal enjoyment of *specified public transportation services* provided by a private entity that is primarily engaged in the business of transporting people" between states or between the United States and a foreign country. *Id.* §§ 12184(a), 12181(1)(A)-(B) (emphasis added).

The statute further defines these general prohibitions of discrimination with a series of more specific rules, at least three of which are relevant here. First, Title III requires a place of public accommodation to provide individuals with disabilities with an "opportunity to participate in or benefit from" its "good[s], service[s], facilit[ies], privilege[s], advantage[s], or accommodation[s]" equal to that which it provides to individuals without disabilities. 42 U.S.C. 12182(b)(1)(A)(ii). Second, with respect to physical barriers to access, the statute requires the place of public accommodation or the specified public transportation service to remove them "where such removal is readily achievable." *Id.* § 12182(b)(2)(A)(iv). Third, the statute forbids discrimination in public accommodations against individuals "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." *Id.* § 12182(b)(1)(E).

Pursuant to a specific grant of statutory authority, 42 U.S.C. 12186, the Department of Justice (DOJ) and the Department of Transportation (DOT) have issued regulations

clarifying the statutory definitions of "public accommodation" and "specified public transportation." These regulations define public accommodation to embrace any privately operated "facility" – including "rolling stock or other conveyances" – that contains, for example, a "place of lodging," "restaurant," or "place of exercise or recreation." 28 C.F.R. 36.104. The DOJ interprets this language to encompass "places of public accommodation operated in mobile facilities (*such as cruise ships*, floating restaurants, or mobile health units)." 28 C.F.R. pt. 36, App. B (emphasis added). Similarly, the DOT has stated unequivocally that "[c]ruise ships easily meet the definition of 'specified public transportation' * * * [because they] are used almost exclusively for transporting passengers * * *, [they] operate according to set schedules or for charter, and their services are offered to the general public * * * on a regular and continuing basis." 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991); see also 42 U.S.C. 12181(10) (defining "specified public transportation").

2. Respondent Norwegian Cruise Line Ltd. is a multi-billion-dollar Bermuda corporation whose principal place of business is Miami, Florida. Resp. C.A. Br. 4; Pet. App. 16a. It operates cruise ships under the Bahamian flag that depart from United States ports. Pet. App. 16a.

Petitioners consist of two groups of individuals. The first group is persons with disabilities who traveled on respondent's cruise ships that departed from and returned to the Port of Houston, Texas in September 1998, August 1999, and September 1999. Amended Compl. ¶¶ 13, 15, 17. The second group is the companion petitioners: individuals who accompanied the petitioners with disabilities. All of the petitioners intend to take future cruises on respondent's ships. *Id.* ¶ 37.

The petitioners with disabilities have mobility impairments that substantially interfere with the major life activity of walking and that require them to use wheelchairs

or motorized scooters. Amended Compl. ¶ 6. They allege that respondent denied them the equal benefit and enjoyment of its facilities by discriminating against them on account of their disabilities.

In particular, *before even boarding a cruise ship*, the petitioners with disabilities were subjected to discrimination because respondent required them to pay higher fares and other surcharges to use one of the approximately four cabins considered accessible to mobility-impaired passengers.[1] Amended Compl. ¶ 17. Subsequently, upon boarding each ship, the petitioners with disabilities encountered architectural barriers that prevented them from enjoying many of the ship's services, programs, and benefits, such as public restrooms, restaurants, swimming pools, and elevators. *Ibid.*; Pet. App. 2a. In addition, respondent failed to create or maintain an emergency evacuation procedure for these petitioners. Indeed, although emergency evacuations take place on a deck that is completely inaccessible to petitioners with disabilities, respondent never informed them how they would be evacuated in the event of an emergency. Amended Compl. ¶ 19.

The companion petitioners allege that respondent denied them the equal benefit and enjoyment of its facilities by discriminating against them on account of their association with the petitioners with disabilities. First, before boarding the ship, these petitioners were also required to pay the higher fares for accessible (albeit less desirable) cabins on respondent's cruise ships, Amended Compl. ¶¶ 16, 18, as respondent requires its passengers with disabilities to travel with a companion, even if they are self-reliant. Pet. C.A. Br. at 5 n.2, 6. Second, while on the ship, these companion

[1] Petitioners traveled on either the Norwegian Star, which has approximately 800 cabins, or the Norwegian Sea, which can carry approximately 1500-1800 passengers. Amended Compl. ¶¶ 14, 16. None of the approximately four accessible cabins on each ship has a balcony or a window. Pet. C.A. Br. 6.

petitioners often were forced to miss programs, services, and activities that occurred in inaccessible locations because respondent expressly prohibited them from leaving their companions with disabilities alone. Amended Compl. ¶ 18; Pet. Dist. Ct. Br. 2 n.1, 20 n.19.

3. In 2000, petitioners filed this putative class action in the U.S. District Court for the Southern District of Texas. Petitioners sought declaratory and injunctive relief under Title III of the ADA to remedy respondent's widespread discriminatory practices.

Respondent moved to dismiss the complaint for failure to state a claim. Petitioners, joined by the United States as *amicus curiae*, opposed the motion.

The district court granted respondent's motion with respect to petitioners' claims that sought removal of physical barriers on the ships. Although the general statutory requirement of "readily achievable" barrier removal in existing facilities is self-executing, see 42 U.S.C. 12182(b)(2)(A)(iv), the court found it critical that the DOJ and DOT had not yet issued cruise ship-specific Title III regulations regarding *new construction* and *alterations*. Because those regulations had not been promulgated, the district court held that separate claims relating to the barrier removal issues were precluded. Pet. App. 42a.

The district court otherwise rejected respondent's motion to dismiss. The district court specifically held that the petitioners with disabilities had stated a claim with respect to the cruise line's pricing policies and its denial of access to various services and activities onboard its ships. Pet. App. 28a. The district court further held that the companion petitioners had stated a cognizable claim with regard to their allegations of associational discrimination. *Id.* 47a.

In reaching these holdings, the district court held that Title III of the ADA applies to foreign-flag cruise ships and their operating companies, agreeing with petitioners and the United States. Cruise ships, the district court explained, fit

within the definitions of both "public accommodation" and "specified public transportation." Pet. App. 23a, 25a. The district court relied, in particular, on similar rulings of the Eleventh Circuit, see *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (CA11 2002), and another district court, see *Deck* v. *American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). The district court also explained that the DOT's and DOJ's conclusions that Title III applies to cruise ships supported its decision. See Pet. App. 23a-25a; 28 C.F.R. pt. 36, App. B (DOJ); 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (DOT).

The district court also rejected respondent's claim that it is exempt from Title III because it operates foreign-flag ships. The district court recognized that the relevant conduct occurred solely within the "geographic boundaries of the United States." Pet. App. 31a. Relying on the Eleventh Circuit's conclusion that "a foreign-flag ship sailing in United States waters is not extraterritorial," *Stevens*, 215 F.3d at 1242, the district court thus held the presumption against extraterritorial application of federal law to be inapposite, Pet. App. 35a.

The court further held that the separate presumption against the application of federal law to foreign-flag ships is limited to laws governing "the internal affairs of the ship," whereas petitioners' claims involve only the relationship between a "foreign-flagged ship and its fare-paying American passengers." Pet. App. 35a. The district court thus expressly agreed with the Eleventh Circuit's holding that the presumption is confined to instances in which "application of American law would interfere with the relations between the ship's foreign owner and the ship's foreign crew." *Stevens*, 215 F.3d at 1242.

Furthermore, although ultimately concluding that the lack of regulations governing new construction and alteration

made the barrier removal requirements unenforceable, Pet. App. 42a, the district court disagreed with respondent's threshold argument that Title III's requirements for structural barrier removal conflicted with the United States' commitments under the International Convention for the Safety of Life at Sea, 32 U.S.T. 47 (1974) (SOLAS). The court noted that any requests for barrier removal that would conflict with the requirements of SOLAS likely would not be "readily achievable," and thus would not be required. Pet. App. 27a. Consistent with the Eleventh Circuit, see *Stevens*, 284 F.3d at 1188, the district court also concluded that dismissal of petitioners' claims based on a "possibility" of a conflict with SOLAS was inappropriate when deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 26a.

4. Both sides appealed. Petitioners challenged the district court's dismissal of their claims seeking the removal of physical barriers aboard the cruise ships. Respondent challenged the district court's holding that Title III applied to its foreign-flag ships. The Fifth Circuit accepted the district court's certification of its decision for interlocutory appeal and held that petitioners' Title III claims were barred outright.

As an initial matter, the court of appeals assumed, without deciding, that Title III generally applies to cruise ships and the companies that operate them. Pet. App. 4a n.3.

Disagreeing with the United States' position as *amicus curiae* supporting petitioners, and acknowledging that its conclusion conflicted with the Eleventh Circuit's decision in *Stevens*, the Fifth Circuit held that Title III does not protect petitioners from discrimination by foreign-flag carriers. The court of appeals recognized that "arguments can be made both ways" concerning the applicability of Title III to foreign-flag ships and their operators. Pet. App. 4a. Nonetheless, the court below primarily rested its decision on two presumptions: the presumption against application of federal

law to foreign-flag ships and the presumption against extraterritoriality.

First, the Fifth Circuit interpreted *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), to "prohibit United States courts from applying domestic statutes to foreign-flagged ships without specific evidence of congressional intent," which the court of appeals determined to be lacking in the wording of Title III. Pet. App. 7a-8a. In so holding, the court specifically deemed the Eleventh Circuit's decision in *Stevens* – which distinguished *Benz* and *McCulloch* as implicating only "the 'internal management and affairs' of a foreign-flag ship," 215 F.3d at 1242 – "unpersuasive": "[T]he plaintiffs' proposed accommodations * * * would require [respondent] to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships. Thus, it is incorrect to suggest, as *Stevens* does, that such modifications do not involve the 'internal management and affairs' of the ship merely because they were requested by a passenger rather than an employee." Pet. App. 13a.

The Fifth Circuit found related support for its conclusion in the principle that "an act of Congress 'ought never to be construed to violate the law of nations, if any other possible construction remains[.]'" Pet. App. 8a (quoting *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). The court explained that "the Title III barrier removal provisions may govern the finest details of maritime architecture in the quest to render ships fully accessible to disabled passengers," thereby "pos[ing] a stark likelihood of conflicts with the standards set out in" SOLAS. *Id.* 9a. "Therefore, as a matter of statutory construction, Title III must be narrowly construed in a manner that avoids these potential conflicts." *Ibid.*

Second, the Fifth Circuit determined that petitioners could not overcome the general presumption against the

extraterritorial application of U.S. law. Petitioners sought to apply Title III extraterritorially, the court reasoned, because "many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. The Fifth Circuit then relied on *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244 (1991), to conclude that Title III failed the "clear-statement requirement to gauge the extraterritorial application of statutes." Pet. App. 8a.

Finally, the Fifth Circuit declined to accord *Chevron* deference to the view of the DOJ and DOT that Title III applies to foreign-flag cruise ships. The government, according to the court of appeals, had issued mere "informal administrative opinions." Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). Moreover, the court found, the DOJ and DOT opinions lacked the "power to persuade" that would entitle them to "respect." *Id.* 14a (quoting *Christensen*, 529 U.S. at 587, and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

5. The full Fifth Circuit denied a petition for rehearing en banc. Pet. App. 48a-49a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are Divided Over the Question Presented.

As the Fifth Circuit itself repeatedly acknowledged, the decision below squarely conflicts with the Eleventh Circuit. In *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (2002), the Eleventh Circuit held that Title III applies both to cruise ships generally and to foreign-flag cruise ships in particular. By contrast, the Fifth Circuit – which assumed without deciding that Title III applies to cruise ships generally – held that Title III does not extend to foreign-flag cruise ships and their operating companies. Pet. App. 14a-15a.

In *Stevens*, the Eleventh Circuit considered a claim that the inaccessibility of a Bahamian-flag cruise ship to persons who use wheelchairs violated Title III. The court concluded that Title III applies to many features of cruise ships. The court began by determining that areas of a cruise ship – such as "places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift [shops], gymnasiums, and health spas" – qualify as "public accommodations." *Stevens*, 215 F.3d at 1241. Because "a restaurant aboard a ship is still a restaurant," and because "Congress made no distinctions * * * based on the physical location of the public accommodation," the Eleventh Circuit reasoned that "those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for the purposes of Title III." *Ibid.*

The Eleventh Circuit then considered, but ultimately rejected, two separate presumptions on which the appellant cruise ship sought to rely: the presumption against the extraterritorial application of U.S. law and the presumption against applying U.S. law to the "internal management and affairs" of foreign-flag carriers. *Stevens*, 215 F.3d at 1242. First, the court concluded, "[t]he presumption against extraterritoriality * * * is inapposite" because foreign-flag cruise ships do not constitute foreign territory when they are "sailing in United States waters." *Ibid.* Second, the court held that the presumption against applying U.S. law to the internal affairs of foreign-flag ships was similarly unavailing because the case before it involved "disabled, fare-paying, American passenger[s]" aboard ships that "sail[] in American waters" and thus did not implicate the "internal management and affairs" of the ship. *Ibid.*

In its opinion accompanying the denial of rehearing and rehearing en banc, the panel further concluded that the possibility of a conflict between Title III and SOLAS did not affect the plaintiff's claims. The court of appeals reasoned that in the absence of a demonstrable conflict between the

plaintiff's claims and SOLAS, it would be inappropriate to dismiss the suit. *Stevens*, 284 F.3d at 1188.

As detailed above, see *supra* at 6-9, with respect to each of the three significant points of contention regarding the application of Title III to foreign-flag ships and their parent companies – the presumption against the extraterritorial application of U.S. law, the presumption against the application of U.S. law to the internal affairs of foreign-flag ships, and the implications of SOLAS's safety provisions – the Fifth and Eleventh Circuits reached directly conflicting conclusions of law and, as a result, are divided with regard to the question presented. In contrast to the *Stevens* court's determination that neither the general presumption against the extraterritorial application of U.S. law nor the more specific presumption against applying U.S. law to foreign-flag ships applied to Title III claims by cruise-ship passengers, the Fifth Circuit determined that both presumptions weighed against applying Title III to respondent's ships. Moreover, the Fifth Circuit's decision to construe Title III narrowly to avoid the "stark likelihood of conflicts" with SOLAS, Pet. App. 9a, cannot be reconciled with the Eleventh Circuit's decision.

This case is an ideal vehicle to decide whether Title III applies to foreign-flag cruise ships and their operating companies. The issue was squarely presented and preserved below, and the viability of petitioners' claims depends on its answer.

The Amended Complaint includes a variety of claims under Title III, ranging from discrimination in pricing, to denial of access to various services, to failure to remove physical barriers, and to associational discrimination. This case, therefore, enables this Court to consider the application of Title III in a comprehensive manner.

Moreover, this case presents the opportunity to determine whether Title III applies to the on-land conduct of companies that operate foreign-flag ships. The Fifth Circuit held that those companies are entirely exempt from Title III, even

though they maintain offices and sell tickets on United States soil.[2] However, because foreign companies are routinely required to adhere to state and federal laws when the conduct at issue has taken place within the United States, petitioners' pricing claims should remain viable even if Title III does not apply to respondent's foreign-flag ships. This case therefore presents an ideal vehicle not only to resolve the extent of the applicability of Title III to foreign-flag ships, but it also allows this Court to determine whether the cruise companies themselves are bound by Title III when operating on U.S. soil.

II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.

This is no mere conflict between two circuits. The Fifth and Eleventh Circuits have jurisdiction over the ports from which nearly two-thirds of all United States cruises depart.[3] Moreover, fully eighty-five percent of cruises depart from ports within the Fifth, the Eleventh, and the Ninth Circuits, where a district court has held that the ADA applies to cruise ships. See *Deck* v. *American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057, 1061 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). As a result, this conflict renders uncertain the rights of millions of travelers with disabilities. The importance of the uniform application of federal law and the peculiar nature of the cruise

[2] By the Fifth Circuit's logic – which exempts all activity of a company that operates foreign-flag ships from the requirements of Title III – the respondent's new U.S.-flag ships ought similarly to be exempt from Title III, notwithstanding respondent's own concession that U.S. laws apply on those ships. See Kelly Yamanouchi, *Cruising into a New Era*, Honolulu Advertiser, Sept. 7, 2003, at 1F (respondent implying that it will have to comply with U.S. labor laws on its U.S.-flag ships).

[3] Statistics were compiled from data received from the Office of Statistical and Economic Analysis, United States Maritime Administration (MARAD). MARAD's data accounts for the top ten cruise lines, which comprise approximately ninety-five percent of cruises departing from the United States.

industry combine to render the circuit conflict untenable. This Court's intervention is required to resolve this conflict.

Since 1990, nearly *all* cruise ships departing from United States ports have sailed under foreign flags. When Congress enacted the ADA in 1990, there were only two United States-flag ocean-going cruise ships in operation, in comparison to seventy-five foreign-flag ships. H.R. Rep. No. 102-357, at 2 (1991). Since 2001, *no* cruise ship has flown the United States flag.[4] Iver Peterson, *Leading Passengers to Water*, N.Y. Times, Sept. 28, 2003, § 5, at 8; Rhoda Amon, *Here's the Life: Retire to a Ship, Meals Included*, Newsday, Feb. 23, 2003, at E5. Therefore, if foreign-flag ships are exempt from Title III, the entire industry effectively has license to discriminate against passengers with disabilities.

The importance of the question presented is heightened because it is outcome determinative. Only in those jurisdictions that permit claims based on Title III may cruise passengers who have suffered discrimination on the basis of their disabilities vindicate their rights, as Congress intended. Simply put, in the Eleventh Circuit, cruise passengers have a remedy against disability-based discrimination. In the Fifth Circuit, they do not.

Moreover, because individual cruise ships travel between different circuits, the same foreign-flag ship may be subject to litigation in more than one circuit. While this conflict persists, a passenger who boards a cruise in the Eleventh Circuit may have rights under federal law that are denied to a passenger who boards the very same ship in the Fifth Circuit.

[4] Respondent intends to introduce at least one new U.S.-flag cruise ship and to re-flag several foreign-flag ships with the United States flag over the next several years. Iver Peterson, *Leading Passengers to Water*, N.Y. Times, Sept. 28, 2003, § 5, at 8. However, only one of these ships will be operating in the near future. (Respondent's "Pride of Aloha" goes into operation in June 2004.) The remainder of the ships will be phased in over the course of several years. *Ibid.* Furthermore, these ships will cruise exclusively out of Hawaiian ports, which constitute a very small percentage of United States cruise departures.

This situation is exacerbated by cruise lines' regular practice of using forum selection clauses in their contracts. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593 (1991) (holding that a non-negotiated forum selection clause is reasonable at least in part because cruise lines, which typically carry passengers from different locales, have a "special interest in limiting the fora in which [they] potentially could be subject to suit"). Despite the fact that more than half of United States cruise passengers depart from ports located in the Eleventh Circuit, a cruise line could select a jurisdiction in the Fifth Circuit as the appropriate forum. In that situation, Title III would not apply to a passenger from the Eleventh Circuit who departs from, and returns to, a port in the Eleventh Circuit, even though the Eleventh Circuit has held that Title III applies. Thus, if the circuit split is not resolved, the entire cruise line industry could seek to evade the application of Title III even though the industry operates primarily in a circuit in which cruise ships and their operators are subject to that law.

As a result, the current circuit split affects the travel opportunities for millions of Americans with disabilities and their companions. There are forty-nine million Americans with disabilities over the age of five, of whom more than eleven million travel every year. U.S. Census Bureau, *Disability Status: 2000 – Census 2000 Brief*, *available at* http://www.census.gov/hhes/www/disable/disabstat2k/table1.html (last visited Mar. 31, 2004); Lynnley Browning, *From Beaches to Cities, Efforts to Serve Disabled Travelers*, N.Y. Times, Oct. 19, 2003, § 3, at 9. A recent study suggested that many more Americans with disabilities would travel if accommodations were more accessible. *Travelers With Disabilities Could Spend $27 Billion Per Year, Says New Harris Interactive Poll*, Jan. 16, 2003, *available at* http://www.opendoorsnfp.org/_ wsn/page15.html (last visited Mar. 31, 2004). Thus, whether Title III applies to foreign-flag cruise ships has significant practical implications for millions of Americans. The importance of the question

presented and the untenable nature of the circuit conflict demonstrate that this Court's intervention is necessary to resolve this issue.

III. Title III of the ADA Applies to Foreign-Flag Cruise Ships and Their Operators.

Certiorari is furthermore warranted because the decision below is wrong on the merits. Simply put, the question in this case is whether U.S. citizens enjoy the protection of U.S. law when they contract to take a cruise that originates in a U.S. port and is operated by a company whose principal place of business is the United States. The statutory language, this Court's precedents, and general principles dictate an affirmative answer to that question. The court of appeals' decision to the contrary was erroneous.

1. Cruise ships surely fall within Title III's definitions of a "public accommodation" and "specified public transportation." As the DOT recognized when interpreting the scope of Title III, cruise ships constitute a "hybrid of a [public] transportation service and a public accommodation." 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991). Indeed, the court of appeals did not even question that general proposition. Rather, it failed to heed Congress's broad commitment to confronting discrimination against Americans with disabilities and then erroneously relied on two inapposite canons of statutory construction to exempt foreign-flag cruise ships from the otherwise uncontroversial application of Title III.

2. The Fifth Circuit erred in treating this as a case involving the extraterritorial application of United States law. The relevant conduct occurred entirely within the United States' territorial jurisdiction.

This Court has emphasized that the presumption against the extraterritorial application of U.S. law is implicated only when a party seeks to apply federal law "'beyond places over which the United States has sovereignty or has some measure of legislative control.'" *EEOC* v. *Arabian American Oil Co.*

(ARAMCO), 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). See also *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that the "presumption against extraterritorial application of federal statutes [is] inapplicable" when "the actionable tort had occurred in American waters"). The Fifth Circuit mistakenly looked to whether Congress intended Title III to apply on the "high seas," Pet. App. 14a (quoting *ARAMCO*, 499 U.S. at 258), whereas petitioners challenge only respondent's discriminatory conduct while selling tickets to United States passengers, while docked in a United States port, and while traveling within the United States' territorial waters[5] – areas that are unquestionably within the United States' sovereign territory.

Though it is true that the impact of any structural changes that respondent might make to its cruise ships could remain once those ships travel beyond the United States' territorial waters, that prospect does not mean, as the Fifth Circuit thought, that Title III would have "extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. In *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923), this Court held that while the Volstead Act's prohibitions on alcohol importation and transportation (including the transportation of alcohol into U.S. territorial waters for use outside the U.S.) did not apply outside the United States' territorial waters, *id.* at 123-24, it did apply to foreign-flag vessels within those waters, *id.* at 124. In so holding, the *Cunard* Court held that the fact that enforcement of a statute within the United States may have an effect outside of the United States does not turn such enforcement into an impermissible extraterritorial application of United States

[5] This Court has recognized that the United States' territorial sea extends twelve nautical miles from shore. See *United States* v. *Alaska*, 521 U.S. 1, 8 (1997) (citing Presidential Proclamation No. 5928 (1988), *reprinted in* notes to 43 U.S.C. 1331).

law. *Id.* at 130. See also *Envtl. Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (CADC 1993) (recognizing that "an extraterritorial application of a statute involves the *regulation* of conduct beyond U.S. borders") (emphasis added).

Furthermore, that domestic application of Title III has implications beyond United States territory is purely incidental to the proper, broad construction of Title III that provides Americans with disabilities with comprehensive protection against discrimination in their own country. Because petitioners' claims derive from activities conducted within the United States' sovereign territory, the presumption against extraterritoriality is inapposite.

3. The Fifth Circuit also erred in extending the narrow presumption against applying federal law to foreign-flag ships. This Court has applied that presumption only when the "internal management and affairs" of a foreign-flag ship are at issue. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963). As the Eleventh Circuit correctly recognized, "this presumption has generally been applied where application of American law would interfere with the relations between the ship's foreign owner and the ship's foreign crew." *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242 (2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (2002).

Thus, in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), this Court refused to apply the Labor Management Relations Act (LMRA), 29 U.S.C. 141 *et seq.*, to a labor dispute between a foreign ship and its foreign crew. The *Benz* Court noted that "[t]he whole background of the [LMRA] is concerned with industrial strife between American employers and employees." 353 U.S. at 143-44. Here, by contrast, the ADA's broad scope encompasses the relationship between respondent and its U.S. passengers who boarded a cruise ship at a United States port. Title III has nothing to do with the internal order of respondent's ships.

Cf. *Int'l Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 221 (1982) (refusing to invoke the "tradition of restraint in applying the laws of this country to ships of a foreign country" when a boycott "did not aim at altering the terms of employment of foreign crews on foreign-flag vessels * * * [and] did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners").

The rationale underlying the presumption against application of federal law to foreign-flag ships is wholly inapposite here. This Court created the presumption to prevent diplomatic problems between the United States and the flag nation resulting from the United States' assertion of jurisdiction over the flag nation's ship. Indeed, the presumption has been applied only amid "highly charged international circumstances," *McCulloch*, 372 U.S. at 21, or "where the possibilities of international discord are so evident and retaliative action so certain," *Benz*, 353 U.S. at 147. By contrast, when the United States is respondent's principal place of business, Amended Compl. ¶ 10, the flag nation has limited involvement in the oversight of its cruise ships,[6] and there is no actual conflict with the law of another nation, the Fifth Circuit's application of the presumption, divorced from its rationale, is unwarranted.[7] Cf. *Int'l Longshoremen's Local*

[6] William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes On Royal Caribbean Cruise Lines*, 19 Wis. Int'l L.J. 71, 92 (2000) (noting that "flag-states reap great financial benefits from cruise lines and are loathe to give these companies a reason (e.g., strict oversight and enforcement of pollution laws) to find another home"); William Langeweische, *Anarchy at Sea*, Atlantic Monthly, Sept. 1, 2003, § 2, at 50 (recognizing that most flag nations "have neither the expertise nor the inclination to enforce their own official standards"); Bob Edwards & Elizabeth Arnold, *Alaska's Efforts to Clean Up the Cruise Industry* (National Public Radio broadcast, May 11, 2001) (commenting that cruise companies register their ships in countries "where laws are lax and enforcement is non-existent").

[7] Similarly, in an action under the Jones Act, 46 U.S.C. 688, this Court held that the presumption did not prohibit the application of federal

1416 v. *Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (holding that U.S. law applies to a wage dispute involving U.S. residents employed by foreign-flag ships to work their docks because it "threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law").

4. The Fifth Circuit further erred when it held that Title III's barrier removal provisions present an irreconcilable conflict with the United States' obligations under SOLAS. Citing a federal report by the Passenger Vessel Access Advisory Committee (PVAAC), the court of appeals held that there was a "stark likelihood of conflicts" between the barrier removal provisions and SOLAS, which required it to narrowly construe Title III to avoid the conflicts. Pet. App. 9a (citing PVAAC Report at Chapter 13, Parts I-II, *available at* http://www.access-board.gov/news/pvaac-rept.htm (last visited Mar. 31, 2004)).

For a number of reasons, the court of appeals' conclusion on this point was incorrect. First, any conflict between the Title III regulations and SOLAS is entirely hypothetical and speculative. The PVAAC Report to which the Fifth Circuit referred did not discuss any *current* conflict between SOLAS and Title III; instead, it purported to identify a conflict between SOLAS and a series of *proposed* Title III regulations regarding new construction and alterations of cruise ships. Even so, the PVAAC Report identified only *three* minor conflicts between these proposed regulations and SOLAS. See PVAAC Report at Chapter 13, Parts I-II. For

law to an action by a foreign crew member against a foreign-flag ship where the allegedly tortious conduct occurred in United States waters on a ship that was not merely a "casual visitor" to the United States, and where its owner "engaged in extensive business operation in this country." *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970). The parallels to this case are striking: Petitioners complain of conduct occurring in United States waters on ships that routinely travel to and from United States ports and that are operated by a company whose principal place of business is in the United States.

example, the proposed regulations "require[] changes in level greater than ½ [inches] to be ramped." *Ibid.* In contrast, SOLAS simply requires that thresholds be "of ample height and strength" and that doors opening to the weather deck be capable of becoming watertight efficiently. *Ibid.* (citing SOLAS § II-1-20.2).[8] A minor conflict such as this should not prevent Title III from prohibiting other structural barriers on cruise ships or other discriminatory practices that do not involve such barriers.

Second, petitioners can prevail even if SOLAS narrows the relief to which they are entitled. Title III's requirements that *currently* apply to cruise ships are crafted to minimize conflict with statutory obligations. As the district court correctly noted, Title III requires barrier removal only where it is "readily achievable." Pet. App. 27a (quoting 42 U.S.C. 12182(b)(2)(A)(iv)). It is unlikely that barrier removal would be "readily achievable" where it would conflict with SOLAS. Indeed, both the DOT and DOJ have made clear that foreign-flag ships are not subject to domestic law when "there are specific treaty prohibitions that preclude enforcement." Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.), *available at* http://www.ada.ufl.edu/ADAcd/cdpages/HTM_Pubs/TAMAD3UP.HTM (last visited Mar. 31, 2004) (DOJ interpretation). See also 56 Fed. Reg. 45,585, 45,600 (Sept. 6, 1991) (DOT interpretation).

Finally, it is particularly inappropriate for the Fifth Circuit to rely on the possibility of a conflict with SOLAS while deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The question is whether *any* of Title III's barrier removal provisions should apply; if they do, then a district court can determine which provisions are

[8] The two other conflicts identified in the PVAAC Report concern the angle of inclination of stairs and the use of elevators as emergency exits. See PVAAC Report at Chapter 13, Parts I-II.

readily achievable.[9] Analyzing that question will not be difficult or time consuming given the few conflicts that may exist with the proposed regulations. Indeed, this analysis will not be substantially different than that which federal district courts perform in every Title III barrier removal case. These limited conflicts do not justify exempting an entire industry from Title III's obligations, thus allowing foreign-flag cruise ships to be the only "public accommodation" or "specified public transportation" on which it is permissible to discriminate against Americans with disabilities while within the United States' territorial boundaries.

5. Not only does Title III reach foreign-flag cruise *ships*, it manifestly reaches the operation of foreign-flag cruise *lines* with respect to their activities on United States land. Yet the Fifth Circuit dismissed petitioners' claims that respondent's on-land pricing policies violate Title III. The Fifth Circuit created an exemption from Title III for cruise *lines* that do business within the United States because those companies operate foreign-flag *ships* and are incorporated in foreign countries. That ruling ignores the fact that petitioners' pricing claims implicate no U.S. treaty obligation nor any presumption against extraterritoriality. The ruling also violates the settled rule that foreign corporations are subject to state and federal laws for conduct in the United States. See, *e.g.*, *Matsushita Elec. Indus. Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Int'l Fin. Servs. Corp.* v. *Chromas Tech. Canada, Inc.*, 356 F.3d 731 (CA7 2004); *Clausen* v. *M/V New Carissa*, 339 F.3d 1049 (CA9 2003); *PVI, Inc.* v. *Ratiopharm GmbH*, 253 F.3d 320 (CA8 2001); *Lindahl* v. *Air France*, 930 F.2d 1434 (CA9 1991). Indeed,

[9] The Fifth Circuit suggested that this Court has refused to engage in individualized review of conflicts between federal laws and the United States' international obligations. Pet. App. 11a (citing *Benz*, *McCulloch*, and *ARAMCO*). In fact, this Court has repeatedly analyzed whether a specific application of the LMRA conflicts with international law or implicates foreign affairs. See, *e.g.*, *Allied Int'l*, 456 U.S. at 218; *Ariadne Shipping*, 397 U.S. at 200.

cruise lines are often parties in suits in which they are subject to federal or state law.[10] The Fifth Circuit's dismissal of petitioners' claims that respondent's pricing policies violate Title III is thus indefensible.

[10] See, *e.g.*, *Princess Cruises, Inc.* v. *Gen. Elec. Co.*, 143 F.3d 828 (CA4), *cert. denied*, 525 U.S. 982 (1998) (applying Virginia contract law to a contract dispute between a cruise line and a ship repairer); *EEOC* v. *Kloster Cruise Ltd.*, 897 F. Supp. 1422 (S.D. Fla. 1995) (examining whether Kloster Cruise Ltd. violated the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, when it terminated several older, shoreside salespersons); *Latman* v. *Costa Cruise Lines N.V.*, 758 So. 2d 699 (Fla. Dist. Ct. App. 2000), *cert. denied*, 537 U.S. 884 (2002) (subjecting cruise lines, including Kloster Cruise Lines, d/b/a Norwegian Cruise Lines, to Florida's Deceptive and Unfair Trade Practices Act because of the cruise lines' pricing policies). Many of the laws that are the subject of these suits relate to pricing. See, *e.g.*, *Latman*, 758 So. 2d 699; *Premier Cruise Lines, Ltd., Inc.* v. *Picaut*, 746 So. 2d 1132 (Fla. Dist. Ct. App. 1999) (allowing plaintiffs to bring a false and fraudulent advertising claim against a cruise line); *Renaissance Cruises, Inc.* v. *Glassman*, 738 So. 2d 436 (Fla. Dist. Ct. App. 1999) (affirming class certification in a suit alleging deceptive trade practices based on the cruise line's pricing policies).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-21154, 03-20056.

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS NORWEGIAN CRUISE LINE, DEFENDANT-APPELLEE

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLEES
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS NORWEGIAN CRUISE LINE, DEFENDANT-APPELLANT

Argued and Submitted:
Opinion Filed: Jan. 12, 2004

Appeals from the United States District Court for the Southern District of Texas;
John D. Rainey, District Judge, Presiding, D.C. No. H-00-2649

Before REAVLEY, JONES, AND CLEMENT, Circuit Judges.

OPINION

JONES, Circuit Judge.

This appeal presents the question whether Title III of the Americans with Disabilities Act ("ADA") applies to foreign-flagged cruise ships. *See* 42 U.S.C. § 12182 (2000) *et seq.* As a matter of first impression in this circuit, we hold that it does not. We affirm in part and reverse in part the district court's interlocutory orders that formed the basis of this § 1292(b) appeal.

I. BACKGROUND

At various times in 1998 and 1999, the plaintiffs took cruises on Norwegian Cruise Line ("NCL") ships, the *Norwegian Sea* and the *Norwegian Star*. The cruises originated in the Port of Houston, Texas, and traveled to foreign ports of call. Both ships sail under the Bahamian flag. Afterwards, the plaintiffs filed suit asserting that they were discriminated against in violation of Title III of the ADA.

The plaintiffs comprise "disabled plaintiffs" and "companion plaintiffs." The disabled plaintiffs allege that physical barriers on the ships denied them access to: (1) emergency evacuation equipment and emergency evacuation-related programs; (2) facilities such as public restrooms, restaurants, swimming pools, and elevators; and (3) cabins with a balcony or a window. The disabled plaintiffs also allege that NCL charged them a premium for use of the four handicapped-accessible cabins and the assistance of crew members. The companion plaintiffs allege that they were discriminated against and denied access to the ships' facilities and amenities because of their "known association" with the disabled plaintiffs.

Alleging their intent to take future NCL cruises, the plaintiffs sought a declaratory judgment, injunctive relief, and reasonable attorneys' fees and costs. More specifically, the plaintiffs sought injunctive relief requiring NCL to remove certain barriers, some temporary and some permanent, that obstructed their access to the ships' facilities. NCL moved to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

After considering the motion, the district court: (1) ruled that foreign-flagged cruise ships are subject to Title III of the ADA; (2) dismissed the plaintiffs' claim concerning removal of physical barriers because the federal government failed to promulgate the necessary regulations; and (3) ruled that the companion plaintiffs stated a claim for associational discrimination.[1] The district court certified the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we accepted the certification.[2]

II. STANDARD OF REVIEW

This court reviews de novo the district court's grant or denial of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *See Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir.2002). "The complaint must be liberally construed in favor of the plaintiff, and all the facts pleaded in the complaint must be taken as true to determine whether the plaintiff has stated a valid claim for relief." *Haynes v. Prudential Health Care*, 313 F.3d 330, 333 (5th Cir.2002) (citations and quotation omitted). "The dismissal will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." *Id.* The district court's interpretation of a statute, the primary issue in this case, is also subject to de novo review. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir.2000).

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[1] The Government's duty to promulgate regulations pertaining to cruise ships, according to the district court, stemmed from 42 U.S.C. §§ 12186(a), (b).

[2] The district court also ruled that the plaintiffs were not entitled to attorneys' fees and court costs. The parties have not addressed these issues on appeal. Furthermore, because we conclude that Title III of the ADA does not apply to foreign-flagged cruise ships, we do not reach the other issues decided below and subsequently raised in this appeal (*i.e.*, whether the federal government had a duty to promulgate regulations and whether the non-disabled plaintiffs stated a claim for associational discrimination).

III. DISCUSSION

NCL challenges the district court's conclusion that Title III of the ADA applies to foreign-flagged cruise ships. NCL asserts that there is no evidence that Congress intended Title III to apply to foreign-flagged vessels or that Congress even considered the issue. Although, as will be seen, arguments can be made both ways concerning the interpretation of congressional intent, we are persuaded that NCL is correct.

Title III of the ADA provides that: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a)(2000). Title III also prohibits discrimination against disabled individuals on "specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. § 12184(a)(2000). Both "public accommodations" and "specified public transportation services" are subject to the barrier removal requirements of Title III. *See* 42 U.S.C. §§ 12182(b)(2)(A)-(C)(2000).[3]

It is settled that "a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) (citing *Wildenhus' Case*, 120 U.S. 1 (1887)). However, the local sovereign is under no obligation to exercise its authority to the outer limits of its jurisdictional reach. *Benz*, 353 U.S. at 142. Since "the exercise of that jurisdiction is not mandatory but

[3] The district court found that Title III applies to cruise ships as both a "public accommodation" and a "specified public transportation service." NCL did not dispute this issue in the district court, and does not raise the issue on appeal. Therefore, we assume, without deciding, that Title III applies to cruise ships generally and limit this decision to foreign-flagged cruise ships. Whether Title III applies to domestic cruise ships remains an open question in this circuit.

discretionary," *id.*, the Supreme Court held, to apply domestic law to foreign vessels entering United States waters, "there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147. Absent an affirmative intention, "such appeal should be directed to the Congress rather than the courts." *Id.*

In *Benz*, the Supreme Court considered whether the Labor Management Relations Act of 1947 ("LMRA") applied to a dispute involving "a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." 353 U.S. at 139. The Court answered that question in the negative. *Id.* If Congress had "so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within its territorial waters." *Id.* at 142. But given the dearth of legislative history evincing Congress's intent to apply the LMRA to foreign-flagged vessels, *id.* at 143-147, the Court concluded that Congress had not "fashion[ed] itself to resolve labor disputes between nationals of other countries operating ships under foreign laws." *Id.* at 142.

Likewise, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which addressed whether the National Labor Relations Act ("NLRA") applied to the "maritime operations of foreign-flag ships employing alien seamen," *id.* at 13, the Court again emphasized that the decisive question was not whether Congress had the power to apply the NLRA to foreign-flagged ships, but whether Congress had chosen to do so. *See id.* at 17. The *McCulloch* plaintiffs asserted that their case, unlike *Benz*, involved "a fleet of vessels not temporarily in the United States waters but operating in a regular course of trade between foreign ports and those of the United States[.]" *McCulloch*, 372 U.S. at 19-20. The Court found the distinction unavailing.

As in *Benz*, the *McCulloch* plaintiffs were "unable to point to any specific language in the Act itself or in its

extensive legislative history that reflect[ed] such a congressional intent." *McCulloch*, 372 U.S. at 20. Accordingly, the Court held that the NLRA did not apply to foreign-flagged ships, and it reiterated that the plaintiffs should petition "to the Congress rather than to us." *Id.* at 22 (citation omitted).

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) ("*ARAMCO*"), amplifies the Supreme Court's adherence to established principles of statutory construction and fundamental tenets of international law. In *ARAMCO*, the Court considered whether Title VII applied "extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad." *Id.* at 247. The Court stated that "[i]t is a longstanding principle of American law that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 248 (citations and quotations omitted). "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (citing *McCulloch*, 372 U.S. at 20-22). Therefore, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *ARAMCO*, 499 U.S. at 248 (quoting *Benz*'s requirement of clear expression by Congress, 353 U.S. at 147).

The EEOC, relying on two statutory provisions, contended that Congress did intend for Title VII to apply abroad. First, the EEOC argued that Title VII's definitions of "employer" and "commerce" were sufficiently broad to include American companies located beyond the United States. Despite conflicting plausible interpretations of the relevant language, the Court found that it "need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application[.]" *ARAMCO*, 499 U.S. at 250. Moreover, under the EEOC's interpretation, "[t]he intent of Congress as to the extraterritorial application of this statute

must be deduced by inference from boilerplate language which can be found in any number of Congressional acts, none of which have ever been held to apply overseas." *Id.* at 250-51 (citing Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*) (other citations omitted).

Second, the Court rejected the contention that the "alien exemption" provision created a negative inference supporting application of Title VII abroad. "Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are not willing to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *ARAMCO*, 499 U.S. at 255.

The Court also found that other aspects of Title VII belied the EEOC's position. Title VII only addressed issues of state sovereignty, and Congress failed to provide any mechanisms for the statute's overseas enforcement. Moreover, unlike the Age Discrimination in Employment Act ("ADEA"), a parallel statute, Congress did not address conflicts with laws of other nations.[4]

Together, *Benz* and *McCulloch* prohibit United States courts from applying domestic statutes to foreign-flagged

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[4] After the passage of the ADEA several circuits determined that it could not be applied extraterritorially to "Americans employed outside the United States by American employers." *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 610 (3d Cir.1984); *see also Thomas v. Brown & Root, Inc.*, 745 F.2d 279, 281 (4th Cir.1984) (per curiam); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828-29 (10th Cir.1984). However, shortly thereafter, Congress amended the ADEA to allow extraterritorial application under certain circumstances. *See generally* 29 U.S.C. §§ 623 and 803. Consequently, after the *ARAMCO* decision, Congress conformed Title VII to the ADEA and included as "employees" United States citizens working "in a foreign country." *See* 42 U.S.C. § 2000e(f)(2000). Title VII also now exempts American employers located abroad from compliance with Title VII if it would cause the employer "to violate the law of the foreign country in which such workplace is located." 42 U.S.C. § 2000e-1(b)(2000).

ships without specific evidence of congressional intent. Under the Supreme Court's framework, Congress may enact legislation that governs foreign-flagged cruise ships operating within United States waters, but it must clearly indicate its intention to do so. *See Benz*, 353 U.S. at 147. *ARAMCO* applies the same clear-statement requirement to gauge the extraterritorial application of statutes.

There is no indication, either in the statutory text or in the ADA's extensive legislative history, that Congress intended Title III to apply to foreign-flagged cruise ships. If Congress had so intended, "it would have addressed the subject of conflicts with foreign laws and procedures." *ARAMCO*, 499 U.S. at 256. Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved.[5]

Furthermore, an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains[.]" *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir.2001) (recognizing that the "*Charming Betsy* canon . . . has traditionally justified a narrow interpretation of ambiguous legislation to avoid violations of international law"). Thus "[b]ecause Congress legislates against the backdrop that includes those international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir.1996). Because the Title III barrier removal provisions may govern

[5] Under international law, the flag state is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship and to maintain good order thereon, and for ensuring that activities aboard the ship do not endanger other ships or the marine environment. This responsibility continues at all times, wherever the ship is located. Restatement (Third) of the Foreign Relations Law of the United States § 502 cmt. a (1987).

the finest details of maritime architecture in the quest to render ships fully accessible to disabled passengers, those provisions pose a stark likelihood of conflicts with the standards set out in the International Convention for Safety of Life at Sea ("SOLAS").[6] Therefore, as a matter of statutory construction, Title III must be narrowly construed in a manner that avoids these potential conflicts. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action.").

Nevertheless, the plaintiffs offer several counter-arguments. First, the plaintiffs contend that because the ADA applies to cruise ships generally, it presumptively applies to foreign-flagged cruise ships, absent a specific exemption. Plaintiffs rely primarily on *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), to support this argument.[7]

In *Cunard*, the Supreme Court held that the National Prohibition Act, enacted to enforce the Eighteenth Amendment, applied to foreign-flagged vessels in United

[6] The Passenger Vessel Access Advisory Committee ("PVAAC"), a government-created body, identifies apparent conflicts between the Title III barrier removal standards and SOLAS in its recent report. *See* PVAAC Report at Chapter 13, Parts I-II available at http://www.access-board.gov/news/pvaac-rept.htm (referencing potential conflicts between SOLAS and the guidelines announced by the ADAAG Review Advisory Committee – the governmental body tasked by Congress with formulating the Title III barrier removal guidelines). Thus, there is little, if any, dispute that Title III barrier removal requirements potentially conflict with SOLAS, a treaty the United States has ratified and honors. *See United States v. Locke*, 529 U.S. 89, 102-03 (2000).

[7] Plaintiffs also point to *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), to support their claim that congressional silence is not dispositive. In *Yeskey*, a Title II ADA case, the Supreme Court interpreted the term "public entity" to include state prisons. *Yeskey*, unlike the instant case, found Congress's intent from the express statutory language, and not from its silence. *Id.* at 210. The Court's axiomatic observation that statutes may have unanticipated applications does not alter the presumption against extraterritorial application.

States ports. *Id.* at 124-26. Based on the statute's terms, the Court found that Congress intended the Act to "be operative throughout the territorial limits of the United States" including "all merchant vessels, whether foreign or domestic," when within those limits. *Id.* at 129. The Court noted that the Act "contains no exception of ships in either class and the terms in which it is couched indicate that none is intended." *Id.* at 126. Any exception for foreign-flagged ships, the Court said, would defeat the attainment of the Act's obvious purpose—to prevent the use of intoxicating liquor as a beverage. *See* 27 U.S.C. § 12 (1919). Last, the Act's specific exemption for transportation of liquor through the Panama Canal expressed Congress's intent to apply the statute to all vessels within the territorial waters of the United States. *Id.* at 128-29.

Cunard does not control. First, the Supreme Court premised *Cunard* on the all-pervasive reach of the Eighteenth Amendment and its enforcing statute on specific inferences from the Panama Canal provision. Second, unlike *Benz*, *McCulloch*, and *ARAMCO*, *Cunard* did not involve the possibility of extraterritorial application, but instead regulated only the commercial transport of liquor into United States ports. As the Court noted, "the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the Amendment, to the territorial limits of the United States." *Cunard*, 262 U.S. at 129.

This second distinction is significant. Extraterritorial application of any statute is impermissible absent "the affirmative intention of the Congress clearly expressed[.]" *Benz* 353 U.S. at 147; *ARAMCO*, 499 U.S. at 248; *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (recognizing that "the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind"). This well-founded clear-statement rule serves "to protect against unintended clashes between our laws and those of other

nations which could result in international discord." *ARAMCO*, 499 U.S. at 248. In the present case, many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters. The plaintiffs insist, however, that Title III need not be enforced beyond United States waters. They argue that this suit seeks enforcement within the United States only, or in the alternative, that courts can choose to enforce those aspects of Title III that do not conflict with international law or are not permanent in nature. This approach is inconsistent with the Supreme Court's pronouncements in *Benz*, *McCulloch*, and *ARAMCO*. In none of those cases did the Court examine each proposed application of domestic law to determine whether it might conflict with other nations' laws. Whether Title III's barrier removal provision, if applied to foreign-flagged cruise ships, would have extraterritorial impact is a matter of statutory construction, not a fact-intensive inquiry. Thus, potential conflicts with transnational or international law mandate that we construe the statute narrowly to avoid international discord.[8]

The plaintiffs next rely upon the Eleventh Circuit's decision in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir.2000), *reh'g denied*, 284 F.3d 1187 (11th Cir.2002). In *Stevens*, the court found that Title III applies to those aspects of cruise ships (restaurants, retail stores, health spas, etc.) that qualify as public accommodations. *Id.* at 1241. Further, since Congress did not exclude coverage of foreign-flagged cruise ships while in domestic waters, the court

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[8] *McCulloch* did not examine individual applications of the NLRA to reach its result. Instead, the Court pointed to the prospective conflict that would result from "the concurrent application of the Act and the Honduran Labor Code[.]" 372 U.S. at 21. This impending conflict exemplified the strong basis for its cannon of construction mandating a clear congressional statement. As a result, the Court ruled, as a matter of statutory construction, that the statute could not be applied extraterritorially based on the "possibility of international discord[.]" *Id.*

reasoned that the ADA must apply to them. In this connection, the court viewed *ARAMCO*'s presumption against "extraterritorial" application of domestic law as inapposite, because it did not consider Title III's requirements to apply outside United States waters. *Id.* at 1242.[9]

Stevens limited the *Benz* and *McCulloch* presumption against application of American law strictly to the "internal management and affairs," specifically labor-management relations, of a foreign-flag ship. Given Congress's intent to apply Title III broadly, the *Stevens* court concluded instead that *Cunard* controlled.

With due respect, we find *Stevens* unpersuasive. In *Stevens*, the court maintained that Congress's silence as to cruise ships meant not only that Title III applied to cruise ships, a contention we do not comment upon, but that the coverage of cruise ships necessarily implied coverage of foreign-flag cruise ships. This latter inference disregards the Supreme Court's admonition that before applying domestic law in the "delicate field of international relations," Congress must clearly express its intent. *McCulloch*, 372 U.S. at 21.

That Congress intended Title III to have "broad reach" is insufficient to warrant application to foreign-flagged cruise ships. Title VII and the ADEA, remedial statutes comparable in breadth and purpose to the ADA, were also intended to have "broad reach." *See Miller v. Pub. Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir.1997) (recognizing that the "ADA is part of the same broad remedial framework as the ADEA and Title VII, and that all the anti-discrimination acts have

[9] The *Stevens* court attempted to clarify its position in its order denying the request for rehearing. *Stevens*, 284 F.3d at 1187. The court stated that it did not foreclose the possibility of specific conflicts between international laws and Title III, but that those specific questions could not be addressed at the motion to dismiss stage. *Id.* However, as discussed above, the court's approach is misguided. The conflicts with international law has statutory construction implications, above and beyond any factual dispute that may exist. The *Stevens* court failed to account for these implications, and therefore erred in its construction of Title III.

been subjected to similar analysis"). Nevertheless, Congress's failure specifically to address extraterritorial implications and conflicts with international law proved fatal to both Title VII and the ADEA in this regard. The Supreme Court's decision in *Cunard*, by contrast, turned on more specific statutory language and the nationally pervasive reach of the Eighteenth Amendment and implementing statutes.

Ultimately, the *Stevens* court's attempt to distinguish *Benz* and *McCulloch* is unpersuasive. Like those cases, the present case deals with the "internal management and affairs" of a foreign-flagged ship. *See McCulloch*, 372 U.S. at 20. As noted above, the plaintiffs' proposed accommodations, if applicable, would require NCL to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships. Thus, it is incorrect to suggest, as *Stevens* does, that such modifications do not involve the "internal management and affairs" of the ship merely because they were requested by a passenger rather than an employee. Further, the court's order on rehearing essentially concedes that portions of Title III will apply extraterritorially, but it sidesteps the obvious implication in terms of *Benz*, *McCulloch*, and *ARAMCO*.

Last, the plaintiffs rely on the opinions of the Department of Justice ("DOJ") and the Department of Transportation ("DOT") that Title III applies to foreign-flagged cruise ships. The opinions of DOJ and DOT are presented in technical assistance manuals and public comments, not formal adjudications or rulemaking. *See* DOJ TITLE III TECHNICAL ASSISTANCE MANUAL III-1.2000(d); *See* 56 FED.REG. 45,584, 45,600 (1991). Nonetheless, the plaintiffs argue that these opinions are entitled to *Chevron* deference.

These informal administrative opinions are not entitled to *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement

guidelines, all of which lack the force of law—do not warrant *Chevron [U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]-style deference." *Id.* (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade[.]'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (citing *ARAMCO*, 499 U.S. at 256-58). For the reasons discussed above, the respective positions of DOJ and DOT are not persuasive.[10]

In the end, "when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *ARAMCO*, 499 U.S. at 258 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)). Congress, in enacting Title III of the ADA, failed to express any intention to subject foreign-flagged cruise ships to its dictates. Thus, application of Title III to foreign-flagged

[10] We must also note that Title III directs DOJ and DOT to issue regulatory guidelines with respect to both new construction and barrier removal. *See* 42 U.S.C. § 12186(b). Both agencies promulgated regulations pertaining to barrier removal. *See* 28 C.F.R. 36.304 (2003). DOJ and DOT also promulgated regulations concerning new construction and alterations. *See* 28 C.F.R. § 36.406(a)-(d)(2003). However, DOJ and DOT specifically exempted cruise ships, which demanded—because of unique concerns—separate new construction and alteration regulations. *See* 28 C.F.R. PT. 36, APP. B, at 664 (2003) (stating that DOJ "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements"). Amazingly, now more than a decade since the ADA's passage, DOJ and DOT have yet to issue new construction and alteration regulations specific to cruise ships. Nevertheless, these agencies continue to demand that existing cruise ships meet the rigors of the barrier removal guidelines, even though newly constructed cruise ships remain altogether unregulated. The DOJ and DOT maintain this curious position despite their self-imposed regulatory mandate that "requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for [new construction and] alteration[.]" 28 C.F.R. § 36.304(g)(1). However, because we hold that Title III may not be applied to foreign-flagged cruise ships, we need not reach this thorny regulatory issue.

cruise ships is impermissible.

IV. CONCLUSION

Foreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so. We therefore sustain, albeit on different grounds, the district court's dismissal of the disabled plaintiffs' barrier removal claims. However, we reverse the district court to the extent that any Title III ADA claims remained, including those of the non-disabled plaintiffs, and remand for further proceedings consistent herewith.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-00-2649

DOUGLAS SPECTOR, ET AL., PLAINTIFF
v.
NORWEGIAN CRUISE LINE LTD, d/b/a NORWEGIAN CRUISE LINE, DEFENDANT

Filed Sept. 10, 2002

MEMORANDUM AND ORDER

Pending before the Court is the defendant's motion to dismiss (Dkt. # 6). The motion is GRANTED in part and DENIED in part, as explained below;

FACTUAL AND PROCEDURAL BACKGROUND

In this case, the plaintiffs allege that the defendant has violated Title III of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181, *et seq.* Several of the plaintiffs, Douglas Spector, Julia Hollenbeck, and Rodger Peters, have physical impairments requiring them to use either a wheelchair or electric scooter for mobility (the "mobility-impaired plaintiffs"). The remaining plaintiffs, Ana Spector and David Killough, are not disabled, but traveled on cruises with Douglas Spector and Julia Hollenbeck, respectively (the "companion plaintiffs"). The defendant, Norwegian Cruise Line Limited d/b/a Norwegian Cruise Lines ("NCL"), is a corporation organized under the laws of the Bahamas, with its principal place of business in Miami, Florida.

On various dates during 1998 and 1999, the plaintiffs took cruises on two of NCL's ships, the "Norwegian Sea" and the "Norwegian Star." Both ships sail under the Bahamian

flag[1] and conduct cruises originating in the Port of Houston, Texas. Though each ship can carry hundreds of passengers, they each have only four cabins that are accessible to mobility-impaired passengers. NCL also imposes additional surcharges on such passengers and their companions for use of the accessible cabins and for assistance from crew members. The ships also have barriers in their existing facilities that deny mobility-impaired passengers access to the ships' programs, services, and facilities. For example the ships maintain evacuation equipment and programs in locations that are not accessible to mobility-impaired passengers. The mobility-impaired plaintiffs allege that holding the programs in these areas prevented them from participating in the programs during their cruises, denied them services provided to passengers that were not mobility-impaired, and otherwise denied them access to facilities on the ship.[2] The companion plaintiffs claim that the barriers prevented them from participating in activities as well, because they had to choose between missing activities and leaving their mobility-impaired companions alone.

On August 1, 2000, the plaintiffs filed suit against

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[1] NCL has requested that the Court take judicial notice of the ships' place of registry. *See* Dkt. # 6, Ex. A (LLOYD'S REGISTRY OF SHIPS 1688 (2000). A ship's place of registry is capable of judicial notice because it is a matter of public record, and is capable of accurate and ready determination from such records. *See* FED. R. EVID. 201. Also, both the plaintiffs and the United States have had the opportunity to respond, but neither has objected to the request. *Id.* Finally, taking judicial notice of this evidence outside the pleadings does not convert NCL's motion to dismiss into a motion for summary judgment. *See Barron v. Reich.* 13 F.3d 1370. 1377 (9th Cir. 1994). Consequently, the Court takes judicial notice that the "Norwegian Sea" and the "Norwegian Star" are registered under the Bahamian flag.

[2] In their response to the motion to dismiss, the plaintiffs also claim that NCL refused to provide accessible transportation to and from "shore excursions" at the ports of call on the cruise. *See* Dkt. # 14 at 2. These factual allegations are not contained in the first amended complaint. *See* Dkt. # 4. The Court therefore will not consider them when deciding the pending motion to dismiss.

NCL. They allege that NCL has discriminated against them because of their disabilities, or because of their association with disabled persons. The plaintiffs also seek to certify a class on behalf of "all current and former passengers of NCL cruises" with mobility impairments, and those who NCL "discriminated against because of their known association with" mobility-impaired persons.[3] Alleging their intent to take future NCL cruises, the plaintiffs request a declaratory judgment, injunctive relief, reasonable attorneys' fees, and costs of court. NCL now moves to dismiss the complaint for failure to state a claim. At its request, the Court has granted the United States leave to participate in the case as amicus curiae on behalf of the plaintiffs.

STANDARD OF REVIEW

Rule 12(b)(6) provides that a party may move to dismiss an action for "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted. *Doss v. South Cent. Bell Tel. Co.*, 834 F .2d 421, 424 (5th Cir. 1987) (citing *Kaiser Aluminum & Chern. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982)). When considering a Rule 12(b)(6) motion, a court must accept the plaintiff's allegations as true and draw all reasonable inferences in its favor. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993); *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991). The court may not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts. *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999) (citing *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir.1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). "A court may dismiss a

[3] As the issue of class certification is not yet before the Court, the Court will treat the complaint as an action brought by the individual plaintiffs. *See Kaplan v. Utilicorp United. Inc.*, 9 F.3d 405,407 (5th Cir. 1993).

complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bonner v. Henderson*, 147 F.3d 457, 459 (5th Cir. 1998) (quoting *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994) (citation omitted).

DISCUSSION

NCL argues that the plaintiffs cannot maintain a cause of action against it under Title III of the ADA for several reasons. First, NCL argues that requiring its ships to comply with the ADA is an impermissible extraterritorial application of the statute. Next, NCL argues that it is not required to remove barriers from its ships because the administrative agencies responsible for promulgating regulations regarding cruise ships have failed to do so. Finally, NCL contends that the companion plaintiffs cannot bring claims for "associational discrimination" because their allegations do not demonstrate that they were targeted for discrimination because of their association with disabled persons. The Court will examine each argument in turn.

I. APPLICATION OF THE ADA TO NCL'S SHIPS WHILE DOCKED IN THE PORT OF HOUSTON.

A. Cruise ships as "public accommodations" under Title III of the ADA.

Before addressing whether the ADA applies to foreign-flagged cruise ships, the Court must evaluate whether the ADA applies to cruise ships at all. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Thus, to apply to NCL's ships, Title III must include cruise ships within the definition of "public

accommodations."[4]

1. Prior precedent

Several courts have held that Title III applies to cruise ships. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) *("Stevens I")*, *modified on other grounds on reh'g* 284 F.3d 1187 (11th Cir. 2002) *("Stevens II")*; *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057, 1061 (D. Haw. 1999). For example, the Eleventh Circuit noted that Congress has defined "public accommodation" to include a wide variety of public facilities, including restaurants, theaters, shopping centers, day care centers, and health spas, as long as the operation of those facilities affects commerce. *See Stevens I*, 215 F.3d at 1243 (quoting 42 US.C. § 12181(7)). As cruise ships often contain some of the facilities enumerated in the statute, and Congress chose to define "public accommodations" by type of facility rather than location, the court held that "those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for purposes of Title III." *Id.* The court added, however, that Title III would not apply to cruise ships if the defendants demonstrated that the ship in question did not contain facilities enumerated in § 12181(7), a mixed question of law and fact. *Id.* at 1241 n.8. The court also explained that obligations of the United States under certain treaties or maritime conventions might limit or preclude application of

[4] For purposes of the motion, NCL concedes that cruise ships fall within Title III's definition of "public accommodations." It claims that the Court does not need to resolve this issue to determine whether to dismiss the plaintiffs' claims. However, NCL makes several arguments regarding the potential conflicts between Title III and international maritime treaties and conventions governing cruise ships. These international regulations apply to all ships, foreign-flagged or otherwise, traveling through international, waters. Consequently, NCL's arguments regarding these conflicts require the Court to determine not only whether Title III applies to foreign-flagged cruise ships, but also to cruise ships in general. The Court therefore will examine this issue before addressing the parties' arguments that concern only foreign-flagged ships.

the ADA's accessibility requirements to cruise ships under some circumstances. *Id.* at 1243 n.8, On rehearing, the court added that consideration of every possible conflict between the ADA's accessibility requirements and maritime treaties and conventions was not appropriate on a motion to dismiss under 12(b)(6). *See Stevens II*, 284 F.3d at 1188.

The district court in *Deck* came to a similar result through different reasoning. In *Deck*, the court examined the opinions of the Department of Justice and the Department of Transportation, the two administrative agencies charged with implementing regulations under the ADA. *See Deck*, 51 F. Supp. 2d at 1060. The Department of Justice found that facilities on cruise ships were "public accommodations" to the same extent they would be on land.[5]

> The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters [sic] raised questions about the applicability of this part to places of public accommodation

[5] The Department of Justice's Title III Technical Manual also explains the application of Title III to cruise ships:

> If a ship, or portion of a ship, functions as one of the twelve categories of places of public accommodation, the ship is also subject to the title III requirements for places of public accommodation.
>
> ILLUSTRATION: A cruise ship is owned and operated by a private entity whose primary business is to operate cruise ships. On the ship are places of lodging, restaurants, bars, a health club, and a nightclub. The private entity is a public accommodation and must comply with the applicable requirements of title III.
>
> Places of public accommodation aboard ships must comply with all of the title III . requirements, including removal of barriers to access where readily achievable.

Title III Technical Assistance Manual III-1.2000 (1993).

> operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of facility." Thus the requirements of subparts Band C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (§ 36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in § 36.301.

Id. (quoting 28 C.F.R. Pt. 36, App. B). The Department of Transportation agreed with the Department of Justice, and made similar findings. *Id.* (citing Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991)). The district court found the agencies' reasoning persuasive, and held that the ADA applies to cruise ships. *Id.*

2. Agency deference.

The plaintiffs and the United States argue that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), the Department of Justice and the Department of Transportation's interpretation of Title III is entitled to deference. NCL disagrees, pointing out that the agencies' application of Title III to cruise ships was made in technical assistance manuals and public comments rather than formal adjudications or rule-making procedures. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference."). However, courts do defer to an agency's interpretation of its

own regulations if they are ambiguous. *Id.* at 588 (citing *Auer v. Robbins*, 519 US. 452, 461 (1997)). Here, the regulations prohibit places of public accommodation from discriminating on the basis of disability. *See* 28 C.F.R. § 36.201. A place of public accommodation includes a "facility" containing, among other things, places of lodging and restaurants. *Id.* § 36.104. A facility includes "rolling stock or other conveyances," which the Department of Justice has interpreted to include cruise ships. *See* 28 C.F.R. Pt. 36, App. B (discussing 28 C.F.R. § 36.104). The Court finds this phrase ambiguous, and therefore will defer to the Department of Justice's reasonable interpretation of the regulation. *See Christensen*, 529 U.S. at 588 (citing *Auer*, 519 U.S. at 461).[6]

For this reason, and in light of the prior precedent on the issue, the Court concludes that Title III's definition of "public accommodations" encompasses facilities enumerated in that § 12181(7), even if they are located on cruise ships. *See Stevens I*, 215 F.3d at 1241; *Deck*, 51 F. Supp. 2d at 1061.

B. Cruise ships as "specified public transportation" under Title III of the ADA.

Alternatively, the plaintiffs and the United States argue that cruise ships may be held liable as "specified public transportation" under the ADA. Title III prohibits discrimination on the basis of disability on specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. § 12184(a). Providers of "specified public transportation" cannot impose criteria that "screen out or tend to screen out an individual with a disability. . . from fully enjoying" the transportation services provided, unless the provider can show that the

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[6] Alternatively, even if the interpretation was not entitled to deference, the Court finds it persuasive. *See Christensen*, 529 U.S. at 588 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("[I]nterpretations in contained in formats such as opinion letters are 'entitled to respect' . . . , but only to the extent those interpretations have the 'power to persuade'. . . .").

criteria are "necessary for the provision of the services offered." *Id.* § 12184(b)(1). Such providers also are subject to the same barrier removal requirements as "public accommodations" under § 12182(b)(2)(A). *See id.* § 12184(b)(2)(C); *see also* 49 C.F.R § 37.5(f) (citing 28 C.F.R §§ 36.301.06) (adopting the Department of Justice's standards concerning "eligibility criteria, reasonable modifications, providing auxiliary aids and services, and removing barriers.").

This argument is consistent with the language of the statute. Title III defines "specified public transportation" as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service. . . on a regular and continuing basis." 42 U.S.C. § 12181(10). In the complaint, the plaintiffs allege that NCL's ships make trips to and from the Port of Houston on a weekly basis, and are available to the general public. These allegations place the ships squarely within the statutory definition of "specified public transportation."

Additionally, this interpretation is consistent with prior administrative and judicial analyses of § 12184. For example, Congress gave the Department of Transportation authority to issue regulations to implement § 12184. *See* 42 U.S.C. § 12186(a)(1). While it has not issued a regulation defining cruise ships as "specified public transportation" under § 12184, the agency has expressed its belief that cruise ships are covered:

> In addition to being public accommodations, cruise ships clearly are within the scope of a "specified public transportation service." The ADA prohibits discrimination in the "full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce [42 U.S.C. § 12184(a)]. "Specified public transportation" is defined by

> [42 U.S.C. § 12181(10)] as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."
>
> Cruise ships easily meet the definition of "specified public transportation." Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce. Cruise ships operate according to set schedules or for charter and their services are offered to the general public. Finally, despite some seasonal variations, their services are offered on a regular and continuing basis.

56 Fed. Reg. 45584-01 (1991). Regardless of whether this opinion is accorded *Chevron* deference, the only reported decision on this issue finds its reasoning persuasive, as does this Court. *See Deck*, 51 F. Supp. 2d at 1061. Accordingly, the Court holds that cruise ships are also "specified public transportation" under Title III of the ADA.

C. Possible conflicts between the barrier removal requirements of Title III and the requirements imposed by treaties and maritime conventions governing cruise ships.

NCL argues that the Court should reject the reasoning of the courts and agencies discussed in the previous sections because the application of Title III of the ADA to cruise ships could conflict with international regulations governing the structural and safety requirements of the vessels. According to NCL, seafaring nations have jointly promulgated and adopted a variety of international treaties and maritime conventions to govern how vessels are designed, built, and managed. *See, e.g.*, *International Convention for the Safety of Life at Sea*, 32 U.S.T. 47, T.I.A.S. No. 9700 (1974)

("SOLAS").[7] Nations, including the United States, routinely enforce these regulations on ships that utilize their ports, even if the ships are foreign-flagged. *See, e.g.*, 46 U.S.C. § 3505 (requiring foreign passenger vessels to comply with SOLAS before departing a U.S. port). NCL contends that the accommodations required by Title III could conflict with applicable international standards on the construction and operation of cruise ships. Because the ADA does not clearly override the treaties and conventions that impose the standards, NCL argues that Title III cannot apply to cruise ships. *See Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359,1365 (5th Cir. 1993)(citing *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)) ("Congress may abrogate a treaty or international obligation entered into by the United States only by a clear statement of its intent to do so.").

NCL's argument cannot prevail for several reasons. First, on a motion to dismiss under Rule 12(b)(6), the Court must construe the allegations in the complaint liberally in favor of the plaintiffs. *See Leatherman*, 507 U.S. at 164; *Gaubert*, 499 U.S. at 327. Motions to dismiss must be denied unless the plaintiffs cannot prevail on any cause of action under the facts alleged in the complaint. *See Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Bonner*, 147 F.3d at 459 (quoting *Rubinstein*, 20 F.3d at 166). Allowing the mere "possibility" that the plaintiffs' claims under Title III might conflict with applicable international treaties and conventions to provide a basis to dismiss the claims under Rule 12(b)(6) would draw inferences in favor of NCL, which is prohibited. *See Stevens II*, 284 F.3d at 1188.

Second, Title III expressly addresses the possibility that proposed changes will conflict with new construction and alteration standards external to the ADA. Under Title III, the

[7] The United States and the Bahamas have ratified SOLAS. *See United States v. Locke*, 529 U.S. 89, 102-103 (2000) (United States); *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1079 (2d Cir. 1993) (the Bahamas).

failure to remove barriers to the disabled in public accommodations does not constitute discrimination unless the changes are "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Under the ADA, "readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). To determine whether an action is readily achievable, courts must consider: (1) the "nature and cost" of the changes; (2) the facility's financial resources, number of employees, and impact on its expenses, resources, and operation; (3) the covered entity's financial resources, overall size with respect to the number of its employees, and the number, type, and location of its facilities; and (4) the covered entity's operations and relationship to the facility in question. *Id.* Presumably, if a proposed accommodation would conflict with safety requirements under treaties or maritime conventions, then it would not be "readily achievable" as defined in the statute.[8] Resolution of such an issue, however, would require arguments regarding the safety requirements that conflict with each proposed accommodation, which NCL has not yet presented.

Additionally, Congress included an alternative means of compliance in Title III: "[W]here an entity can demonstrate that the removal of a barrier. . . is not readily achievable," the entity must "make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v). Again, NCL has not yet presented

[8] The Department of Transportation has considered this possibility, and interprets Title III to require its regulations not to conflict with such obligations. *See* Transportation of Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (commenting on 49 C.F.R. § 37.109). The Department of Justice has reached a similar conclusion. *See* Title III Technical Assistance Manual m-1.2000(D) (1994 Supp.) (foreign-flagged ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement").

arguments demonstrating that any specific alternative methods of compliance are not "readily achievable" as a matter of law. As a result, NCL's arguments regarding potential conflicts of law do not demonstrate that Title III is inapplicable to cruise ships.[9]

Third, NCL's arguments fail to address the plaintiffs' claims that do not relate to physical modifications of the ships. For example, the complaint alleges that NCL charges higher fees to mobility-impaired passengers and their companions in violation of the ADA. *See* First Amended Complaint, Dkt. # 4, at ¶¶ 16-17. It also alleges that NCL conducted programs on the ships in such a way to exclude the mobility-impaired plaintiffs and their companions, for example, by conducting programs in non-accessible areas of the ships. *Id.* at 119. NCL has not explained how granting the plaintiffs injunctive relief from this alleged discriminatory conduct would conflict with international treaties or maritime conventions, and therefore its arguments cannot justify dismissal of those claims. *See Stevens II*, 284 F.3d at 1188.

D. Extraterritoriality of applying the ADA to foreign-flagged ships in the territorial waters of the United States.

Next, NCL contends that permitting claims under the ADA against foreign-flagged ships is an impermissible extraterritorial application of the statute. The Supreme Court has explained that federal laws apply only within the territorial jurisdiction of the United States unless the statutory language expressly reflects otherwise. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). NCL argues that foreign-flagged ships are the sovereign territory of their flag nations. As a result, it claims that application of the

[9] At a later stage in the litigation, however, the arguments could demonstrate that Title III does not require certain specific proposed modifications or alternative methods of compliance because they are not "readily achievable" as defined in the statute.

ADA to foreign-flagged ships is extraterritorial even when the ships are located in the territorial waters of the United States. According to NCL, such an application is impermissible because the ADA has no express language authorizing its extraterritorial application. Additionally, NCL believes that the application of the ADA to foreign-flagged ships could conflict with the law of the ships' flag states, offending the doctrine of international comity. As before, the Court will examine each argument in turn.

NCL first argues that any application of law to foreign-flagged ships is presumptively extraterritorial unless it is the law of the flag state. It points out that, under traditional maritime principles, seafaring countries defer to the law of the ship's flag state to regulate "administrative, technical, and labor matters." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502(1)(a). This deference arises out of the practical necessity that "there must be some law on shipboard [and] that it cannot change on every change in the waters." *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953). NCL points to the Supreme Court's statement that "the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.'" *Id.* (quoting *United States v. Flores*, 289 U.S. 137, 155 (1933). According to NCL the Fifth Circuit recently validated this principle when it held that the National Labor Relations Act ("NLRA") applied to an American-flagged ship even though the ship operated [illegible]ely in Hong Kong's territorial waters. *See National Labor Relations Rd. v. Dredge Operators, Inc.*, 19 F.3d 206, 212 (5th Cir. 1994). As a result, NCL argues, applying Title III of the ADA to foreign-flagged ships is extraterritorial even when those ships are within the territorial

waters of the United States.[10]

NCL is correct that courts have drawn analogies to territorial sovereignty when attempting to interpret whether the laws of coastal nations apply to foreign-flagged ships. These analogies, however, have not been applied as broadly as NCL represents. For example, the Third Circuit refused to apply the provisions of the Fair Labor Standards Act to an American-flagged vessel employing only foreign seamen and operating only in foreign waters. *See Cruz v. Chesapeake Shipping*, 932 F.2d 218, 232 (3d Cir. 1991). The court explained that:

> [T]he premise that a vessel flying the American flag, even though temporarily a flag of convenience, is a floating piece of American territory for all purposes wherever it may sail is untenable. "Flags of convenience" are a comparatively new phenomenon developed after the conclusion of World War II by certain non-traditional maritime countries for economic reasons. The state whose flag was flown exercised "minimum control over the activities and operations of these vessels." E. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. OF INTER. LAW 604. It is generally understood among nations engaged in maritime practice that the state whose flag is flown exercises control over

[10] With respect to the seas, the United States exercises sovereignty over a belt extending approximately twelve nautical miles from its coastline. *See United States* v. *Alaska*, 521 U.S. 1, 8-9 (1997). Ports are part of the "internal waters" of a nation, and therefore are included within its sovereignty. *See United States* v. *Louisiana*, 394 U.S. 11, 23, 40 (1969). For purposes of this discussion, the Court will use the term "territorial waters" to encompass all waters subject to the jurisdiction of the United States, including the Port of Houston. *See also Cunard*, 262 U.S. at 122 (U.S. jurisdiction extends to "the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending [a set distance].")

> matters such as qualification of masters and officers of the ship, safety of the seas, discipline aboard the vessel, and investigations into instances of navigation causing destruction of life or serious physical damage.

Id. at 227; *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (citing *Wildenhus's Case*, 120 U.S. 1, 12 (1887)) (The law of the flag state normally governs the internal affairs of the ship.). The Supreme Court has expressed similar sentiments, characterizing "the statement . . . that a merchant ship is a part of the territory of the country whose flag she flies" as "a figure of speech, [or] metaphor." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923).

Similarly, *Dredge Operators* does not stand for the proposition that any application of American law to foreign-flagged ships is extraterritorial. NCL argues that because the Fifth Circuit concluded that application of American law to American-flagged ships in foreign waters is not extraterritorial, it also should follow that application of American law to foreign-flagged ships in American waters must be extraterritorial. The term "extraterritorial" means "beyond the physical and juridical boundaries of a particular state or country." BLACK'S LAW DICTIONARY 588 (6th ed. 1990). Thus, for an application of a statute to be extraterritorial, it must occur outside of the physical boundaries of the nation in question. *See Stevens I*, 215 F.3d at 1242. The reason the Fifth Circuit engaged in a discussion of extraterritoriality in *Dredge Operators* was that the case involved a ship that operated outside of the geographic boundaries of the United States. *See Dredge Operators*, 19 F.3d at 211 (explaining that the refusal of prior courts to apply the NLRA to foreign-flagged ships docked in American ports was not a limitation of the "generally applicable boundaries of commerce," but rather "a judgment that Congress did not intend to interfere with the internal operation of foreign vessels.") (quoting *Dowd v. International*

Longshoremen's Ass'n, 975 F .2d 779, 788 (11th Cir. 1992)). Had the NLRB attempted to exercise jurisdiction over the labor disputes on an American-flagged vessel in an American port, the issue of extraterritoriality never would have arisen.[11]

In *Cunard*, the Supreme Court explained the extent of coastal nations' jurisdiction over foreign-flagged ships while in the coastal nations' territory:

> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

Cunard, 262 U.S. at 124.[12] In *Cunard*, for example, the

[11] NCL also contends that the plaintiffs' proposed application of the ADA will be extraterritorial under the circumstances of this case. The plaintiffs argue that they do not seek to hold NCL to the restrictions of the ADA once its ships pass out of the territorial waters of the United States. NCL argues that this position is disingenuous because any structural modifications resulting from the restrictions likely would remain in place for the duration of the voyage, necessarily taking place inside and outside the United States' territorial waters. This would create a "de facto" extraterritorial application of the statute which, according to NCL, would be entitled to a presumption against enforcement. NCL has not, however, directed the Court's attention to any cases applying or supporting its arguments. Consequently, the Court declines to adopt this apparently novel approach to application of the presumption against extraterritoriality.

[12] There is one important exception to this rule. Under traditional maritime principles, coastal nations generally permit foreign-flagged ships to pass through their territorial waters as long as the ships do not stop in their territory. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS

Supreme Court held that the National Prohibition Act applied to foreign-flagged ships in American ports. *Id.* at 129-31. Expressly rejecting the argument that a foreign-flagged ship was "a part of the territory of the country whose flag she carries" the Court held that Congress had the power to regulate the ability of foreign- flagged ships to serve alcohol to their passengers and crews while in the territorial waters of the United States. *Id.* at 123. The Court found that Congress had intended to apply the Prohibition Act broadly. *Id.* at 130-31. Examining the Prohibition Act as a whole, the Court also did not find any indication that Congress had not intended to extend the broad reach of the statute to cover all ships in the territorial jurisdiction of the United States, including those sailing under foreign flags. *Id.* at 127-29. As a result, the Court upheld the application of the Prohibition Act to foreign-flagged cruise ships in territorial waters. *Id.* at 131.

NCL acknowledges that the United States has the power to regulate foreign-flagged ships in its territorial waters. It points out, however, that the exercise of this power is discretionary. *See Benz v. Campania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 512 reporter's note 5. NCL contends that Congress did not intend to exercise this discretion to apply the ADA to foreign-flagged cruise ships, even if they were within the

LAW OF THE UNITED STATES § 513(1). This right of "innocent passage" extends to the foreign-flagged ships so long as their passage "is not prejudicial to the peace, good order, or security of the coastal state." *Id.* The ability of the coastal nations to regulate ships in innocent passage is limited to issues involving "safety of navigation, protection of cables and pipelines, fishing, the prevention of pollution, scientific research, and the enforcement of customs, fiscal, immigration, and sanitary regulations," or indiscriminate exclusion of all foreign-flagged vessels for national security purposes. *Id.* at § 513(2). None of the parties argue that the ADA applies to ships in innocent passage or that NCL's ships, which admittedly dock in the Port of Houston for purposes of taking on and discharging passengers, meet this exception.

territorial waters of the United States. For example, in *McCulloch*, the Supreme Court declined to apply the NLRA to a Honduran-flagged ship with a crew from Honduras even though the ship's owner, a Honduran corporation, was a wholly owned subsidiary of an American company. *See* 372 U.S. at 21-22. Citing the traditional presumption that the law of the flag state governed the internal affairs of the ship, the Court found little evidence that Congress had intended for the NLRA to have such a broad reach. *Id.* (citing *Wildenhus's Case*, 120 U.S. at 12).

In *Stevens I*, the Eleventh Circuit examined this issue with regard to Title III of the ADA. See 215 F.3d at 1242. The court compared the broad reach *of* the Prohibition Act, which the Supreme Court examined in *Cunard*, reasoning that Congress also had intended to give Title III a broad reach. *Id.* at 1242-43. It also recognized that most cruise ships serving United States ports sailed under foreign flags. *Id.* at 1243. Since Congress had intended to apply Title III to cruise ships generally, the court found the argument that Congress intended Title III to apply only to domestic cruise ships to be an unreasonable interpretation of the statute. *Id.* Instead, it held that Title III of the ADA applied to foreign flagged cruise ships while in the territorial waters *of* the United States. *Id.* at 1242-43. The Court finds this reasoning persuasive, and therefore rejects NCL's argument. NCL also argues that traditional policies of international comity give rise to a presumption that Congress did not intend for Title III of the ADA to apply to foreign-flagged ships. It notes that traditional maritime principles preclude application of American law to a foreign-flagged ship in its territorial waters unless the vessel presents a threat to the "peace or dignity of the country" or to the "tranquility of the port." *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 295 (5th Cir. 1984) (quoting *Lauritzen*, 345 U.S. at 584-85). NCL argues that the plaintiffs' claims do not implicate either of these concerns and, therefore that the Court find that Title III does not apply to foreign-flagged ships in the territorial waters of the United

States.

NCL's arguments to the contrary, foreign-flagged cruise ships are not exempted from compliance with the regulations of port nations. Instead, applicable maritime treaties and traditions permit exemptions where: (1) the ship is engaged in "innocent passage" through the coastal territorial waters of a foreign nation;[13] or (2) the issues regulated involve only the internal affairs of the ship. Neither exemption applies here. The complaint clearly alleges that NCL's ships dock in the Port of Houston, eliminating any argument that they are engaged in innocent passage through the United States' territorial waters. *See* First Amended Complaint, Dkt. # 4, at ¶ 15. Also, applying Title III to the interaction between a foreign-flagged ship and its fare-paying American passengers does not involve the "internal affairs" of the ship, which normally concern only interactions between the foreign captain and crew. *See Stevens I*, 215 F.3d at 1242. Finally, the Court notes that failure to accommodate disabled domestic passengers while in domestic territorial waters directly implicates the territorial sovereign's interest in protecting its citizens' rights. The Court finds this sufficient, in light of the intended broad scope of Title III, to impugn the dignity of the United States ports in which NCL chooses to solicit its customers.

Thus, after considering the relevant precedent, the Court finds that Title III applies to all cruise ships within the territorial waters of the United States, including those registered under foreign flags.[14] As the complaint clearly

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[13] *See* note 13, *supra*.

[14] The plaintiffs also argue that DOJ and DOT have determined that Title III applies to foreign-flagged cruise ships, and that this determination is entitled to deference. The Court disagrees. The comments that the plaintiffs reference do not address the issue of foreign-flagged cruise ships directly, instead merely raising the possibility that Title III applies. *See, e.g.*, Title III Technical Assistance Manual III-1.2000(D) (1993) ("Ships registered under foreign flags that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement."); Transportation for Individuals

alleges that NCL's ships discriminated against the plaintiffs while in the Port of Houston, the Court denies NCL's motion to dismiss their claims on this basis.

E. The effect of administrative agencies' failure to create guidelines regarding new construction or alterations of cruise ships on application of Title III's barrier removal requirements.

NCL next argues that the plaintiffs cannot enforce the ADA's provisions requiring removal of physical barriers to the disabled in places of public accommodation because the executive agencies charged with promulgating architectural and structural guidelines have not yet done so with regard to cruise ships.[15] The plaintiffs and the United States disagree, contending that the agencies' failure to promulgate architectural and structural guidelines regarding new construction and alterations does not alter the cruise ships' basic duty to remove barriers to the disabled in existing facilities on cruise ships.

Title III directs the Department of Transportation ("DOT") to issue regulations to carry out the various transportation provisions of the statute, including § 12184. *See* 42 U.S.C. § 12186(a). The Department of Justice ("DOJ") is required to issue regulations carrying out the remaining provisions of Title III. *See* 42 U.S.C. § 12186(b).

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with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (noting that Congress has jurisdiction over foreign-flagged ships in territorial waters, but that DOT is uncertain whether Title III conflicts with the maritime treaty obligations of the United States).

[15] This argument concerns the plaintiffs' claims only to the extent they seek removal of physical barriers on the ships. It does not apply to the plaintiffs' other claims including, for example, the claims that NCL subjected the plaintiffs to unlawful surcharges for use of accessible facilities and services. *See* 28 C.F.R. § 301(e). It also does not apply to their claims that NCL failed to modify its policies, practices, or procedures to accommodate the plaintiffs. *Id.* § 36.302. *See also Deck*, 15 F. Supp. 2d at 1060-61 (noting that both DOJ and DOT have interpreted the regulations regarding "general nondiscrimination" and nondiscrimination in policies and practices to apply to cruise ships.).

In 1991, DOJ issued regulations governing new construction and alterations of places of public accommodation. *See* 28 C.F.R. §§ 36.401, *et seq.* These regulations require that "[n]ew construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part (ADAAG)." 28 C.F.R. § 36.406. Shortly thereafter, DOJ issued the ADA Accessibility Guidelines (the "ADAAG") in an appendix to the regulations. *See* 28 C.F.R. Pt. 36, App. A. The ADAAG contain extensive standards for many different examples of places of public accommodation, but do not address cruise ships.[16] Similarly, DOT has not promulgated guidelines for "specified transportation services" that are unique to cruise ships or other passenger vessels. *See, e.g.*, 49 C.F.R. §§ 37.95, 37.109, 38.177.

The United States correctly points out that the ADAAG are intended to apply only to new construction and alterations of public accommodations, which are governed by § 12183. There are significant differences between compliance with § 12183, which regulates only new construction and alterations, and § 12182, which governs

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[16] The Department of Justice has explained that, while facilities on cruise ships are "public accommodations" within Title III of the ADA:

> [S]tandards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in Appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

28 C.F.R. Pt. 36, App. B. Similarly, the Title III Technical Assistance Manual states that a cruise ship "is not required to comply with specific accessibility standards for new construction or alterations, because specific accessibility standards for new construction or alteration or cruise ships have not yet been developed." Title III Technical Assistance Manual III-1.2000 (1993).

barrier removal in existing facilities. The main difference is that retrofitting existing facilities normally is more costly than incorporating accessibility into the designs of newly constructed facilities and alterations. *See* 28 C.F.R. Pt. 36, App. B at 646. Congress recognized this difference, and created different tests for compliance depending on whether Title III was applied to an existing facility or new construction or alterations. *Compare* 42 U.S.C. § 12182(b)(2)(A)(iv) (prohibiting failure to remove barriers where such removal is "readily achievable"), *with* 42 U.S.C. § 12183(a)(I) (requiring newly constructed facilities to be accessible unless the design is "structurally impracticable"). DOJ also took this difference into account when it promulgated § 36.304, utilizing guidelines implementing the higher standard for alterations to govern removal of barriers, but permitting public accommodations to deviate from those requirements if they were not "readily achievable." *See* 28 C.F.R. § 36.304(d); *see also* 28 C.F.R. Pt. 36, App. B at 648-49. The reasoning behind this regulation was that, to the extent modifications within the ADAAG were "readily achievable," they could provide a useful reference point for public accommodations to follow in removing barriers. *Id.* The regulations governing removal of barriers in existing public accommodations also refer to the ADAAG as a limitation on what is necessary to comply with Title III's barrier removal requirements, stating that the "requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for alterations. . . [or] new construction . . ." 28 C.F.R. § 36.304(g}. For the most part, DOT's barrier removal regulations for "specified public transportation" adopt DOJ's barrier removal regulations. *See* 49 C.F.R. § 37.5(f).

NCL argues that the agencies' failure to create guidelines governing new construction and alteration of cruise ships excuses it from compliance with the barrier removal requirements of Title III. In essence, NCL claims that DOJ and DOT have failed to provide owners and

operators of cruise ships with any guidance on how to meet their obligations to remove barriers under Title III. It also contends that permitting application of Title III's barrier removal provisions in the absence of such guidelines will subject cruise ships to the whims of individual courts, which could issue inconsistent and possibly conflicting orders on the extent to which the ships must remove barriers.

The United States argues that cruise ships must remove barriers as much as is "readily achievable" regardless of whether the agencies have promulgated standards that would limit the ships' obligations. It suggests that, in the absence of guidelines governing new construction or alterations, facilities must remove barriers to the extent such removal is "readily achievable." The United States also argues that cruise ships should have to provide alternatives to barrier removals that are not readily achievable, or to show that such alternatives are not readily achievable. *See* 28 C.F.R. § 36.305.

The United States proposes several ways in which the Court could enforce the plaintiffs' claims for barrier removal against NCL absent specific guidelines regarding new construction or alterations of cruise ships. First, it suggests that the Court could require the ships to comply with the existing requirements for new construction and alteration of shoreside places of public accommodation. This approach, however, squarely conflicts with DOJ and DOT's interpretations of the ADAAG, which declines to apply such guidelines to cruise ships. *See* 28 C.F.R. Pt. 36, App. B ("[S]tandards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in Appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements."); *see also Deck*, 51 F. Supp. 2d at 1060-61. The Court is required to defer to these

interpretations of the agencies' own regulations, and therefore must reject this approach. *See Christensen*, 529 U.S. at 588 (citing *Auer*, 519 U.S. at 461).

Next, the United States argues that, in the absence of applicable guidelines, the Court could determine what accommodations are "reasonable" on a case by case basis. The United States also points out that not all barrier removal corresponds to applicable guidelines for new construction or alterations. For example, the regulations suggest that public accommodations may reposition shelves and telephones, or rearrange tables, chairs, vending machines, display racks, and other furniture. *See* 28 C.F.R. § 304(b)(3)-(5). The guidelines for new construction or alterations generally do not specifically address these types of accommodations. The United States does not, however, explain how the Court would differentiate between removal of barriers that DOJ or DOT hypothetically would cover under future guidelines for new construction or alterations, and those that DOJ and DOT never would address. Additionally, both approaches suggested by the United States give rise to NCL's concerns regarding the potential lack of uniformity from jurisdiction to jurisdiction.

Several courts have examined whether the agencies' failure to create guidelines for new construction or alterations of facilities on cruise ships excuses them from complying with Title III's barrier removal requirements. A district court in Florida, for example, rejected the argument that the agencies' failure to create guidelines excused cruise ships from the accessibility requirements of the ADA. *See Access Now, Inc. v. Holland America Line-Westours, Inc.*, 147 F. Supp. 2d 1311, 1312-13 (S.D. Fla. 2001). Though it noted that "regulations (or other input from the DOJ) would (a) aid the adjudication of this case and (b) serve the cruise industry well by establishing uniform standards," the court held that "[a]pplicable regulations or other forms of guidance from the DOJ . . . , are not a prerequisite to maintain a Title III access action.'" *Id.* (citing *Paralyzed Veterans of Am. v. Ellerbe*

Becket Architects & Eng'rs, P.C., 950 F. Supp. 393, 394 (D.D.C. 1996), *aff'd sub nom Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Apparently, the court felt that DOJ and DOT had failed to satisfy the ADA's "clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities" because they had neglected their delegated responsibilities to create cruise ship guidelines for over a decade. *Id.* at 1313 (quoting 42 U.S.C. § 12101(b); *see also Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1362 n.4 (S.D. Fla. 2001) (applying the regulations governing barrier removal despite the absence of new construction or alterations guidelines for cruise ships, instead evaluating whether the defendants could reasonably modify their policies, practices, and procedures to accommodate the disabled and whether the modifications were readily achievable).

Other district courts have reached different results. In *Resnick v. Magical Cruise Company*, the court dismissed the plaintiffs' claims that the owner of several cruise ships had violated the ADAAG on new construction and alterations. *See* 148 F. Supp. 2d 1298, 1305 (S.D. Fla. 2001). The court deferred to the DOJ and DOT's statements that the ADAAG did not apply to cruise ships. *Id.* at 1304-05. It found dismissal was appropriate because the owners of the cruise ships had "not been afforded notice of the standards with which they [were] required to comply," but declined to hold categorically that "a claim for denial of access to or on a cruise ship cannot be maintained as [a] matter of law even in the absence of regulations." *Id.* at 1305; *see also Deck*, 51 F. Supp. 2d at 1061 (holding that new construction and alterations provisions of Title III do not apply to cruise ships, but other claims under Title III "are clearly applicable to cruise ships, and thus are properly brought in the instant case.").

Admittedly, this is a difficult issue. After careful consideration, the Court is persuaded that the agencies'

failure to create guidelines for new construction or alterations of cruise ships also bars enforcement of Title III's existing barrier removal guidelines. DOJ and DOT have chosen to implement their regulations in a manner that adopts the alterations guidelines as the standard to meet when removing barriers to the disabled. This approach makes sense, as it permits facilities to better remove barriers and protect themselves from liability by complying with the guidelines for alterations, which normally provide very specific instructions regarding various accommodations. Alternatively, facilities may demonstrate that such compliance is not readily achievable, and instead take other readily achievable measures to remove barriers. DOJ and DOT also found that passenger vessels differed from other public accommodations significantly enough to warrant formation of separate guidelines for the vessels. Though they have had over eleven years to do so, DOJ and DOT have failed to fulfill their duty to provide guidance to the owners of cruise ships and other passenger vessels. This is an unfortunate situation, but it is also one that the agencies may remedy at any time by creating guidelines for the new construction or alterations of cruise ships.[17] Until then, the Court declines to force owners of cruise ships to guess which barriers they must remove to accommodate the disabled, or to subject them to varying and possibly conflicting instructions from courts on the issue. The plaintiffs' claims against NCL therefore are dismissed to the extent they seek removal of physical barriers on the cruise ships.

II. The companion plaintiffs' claims for associational discrimination.

Next, NCL argues that the companion plaintiffs' allegations in the amended complaint are insufficient to state

[17] The plaintiffs also might seek to compel DOJ or DOT to create the guidelines under the Administrative Procedures Act. *See* 5 U.S.C. § 706(1) (permitting individuals to "compel agency action unlawfully withheld or unreasonably delayed").

claims for associational discrimination under Title III.[18] Title III prohibits discrimination by "exclud[ing] or otherwise deny[ing] equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual . . . because of the known disability of an individual with whom the individual . . . is known to have a relationship or association." 42 U.S.C. § 12182(b)(I)(E). To state a valid claim for associational discrimination, courts have held that a plaintiff must allege some "specific, direct, and separate injury" as a result of association with a disabled individual. *Micek v. City of Chicago*, 1999 WL 966970, at *3 (N.D. Ill.); *see also Glass v. Hillsboro Sch. Dist.*, 142 F.Supp.2d 1286, 1288 (D. Or. 2001); *Niemeier v. Tri-State Fire Protection Dist.*, 2000 WL 1222207, at *3-4 (N.D. Ill.).

[18] NCL also argues that the companion plaintiffs lack standing to maintain claims under Title III. To demonstrate standing, plaintiffs must show that an Article III case or controversy exists by demonstrating that (1) they suffered an injury in fact; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable court ruling is likely to redress the plaintiffs' injury. *See Vermont Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 771 (2000). In addition, plaintiffs must meet prudential limitations on standing, which include "the general prohibition on a litigant's raising another person's legal rights, . . . and the requirement that a plaintiff's complaint fall within the 'zone of interests' protected by the law invoked." *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867, 871 (E.D. Wis. 1995) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). NCL does not contend that the companion plaintiffs' claims do not meet the requirements for Article III standing. which courts have described as "undemanding." *See, e.g., Oak Ridge Care Center. Inc.*, 896 F. Supp. at 872 (citing *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). Instead, NCL claims that the companion plaintiffs' allegations fail to satisfy the prudential limitations on standing because they did not suffer injuries cognizable under Title III, and because they cannot base their claims on the rights of the mobility-impaired plaintiffs. Accordingly, if the companion plaintiffs have failed to allege facts sufficient to support a cause of action for associational discrimination under Title III, then the Court must dismiss their claims for both lack of standing and failure to state claims on which relief may be granted.

For example, courts have found cognizable claims for associational discrimination under Title III where insurance companies deny coverage because the applicant's spouse or partner is HIV-positive. *See, e.g., Cloutier v. Prudential Ins. Co. of America*, 964 F. Supp. 299, 304 n.4 (N.D. Cal. 1997); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1320 (C.D. Cal. 1996). Similarly, plaintiffs may state claims for associational discrimination under Title I where employers take adverse employment actions against them because of their association with disabled individuals.[19] *See Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760-61 (5th Cir. 1996).

The issue in this case is whether the companion plaintiffs' injuries are sufficiently "separate" from those of the mobility-impaired plaintiffs to constitute associational discrimination under the ADA. NCL argues that the complaint alleges only that it required the mobility-impaired plaintiffs to stay in the more expensive accessible rooms. *See* Amended Compl. at ¶¶ 14, 16. The companion plaintiffs, it contends, were free to purchase tickets for less expensive non-accessible rooms, but instead chose to stay in the same

[19] Title I prohibits denial of employment opportunities to a "qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). This associational discrimination provision is nearly identical to its counterpart in Title III, and courts have interpreted both according to the same standard. *See, e.g., Micek*, 1999 WL 966970 at *3; *Discovery House, Inc. v. City of Indianapolis*, 43 F. Supp. 2d 997, 1007 (N.D. Ind. 1999). Also, several courts have interpreted the regulations implementing Title II to provide a cause of action analogous to those found in Titles I and II. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48 (2d Cir. 1997) (citing 28 C.F.R. § 35.130(g); *Discovery House, Inc.*, 43 F. Supp. 2d at 1006-07; *Oak Ridge Care Center, Inc.*, 896 F. Supp. at 872; *Tugg v. Towey*, 864 F. Supp. 1201, 1208 (S.D. Fla. 1994). Accordingly, the Court considers associational discrimination cases applying Title I and II of the ADA persuasive authority in determining whether Title III prohibits NCL's alleged treatment of the companion plaintiffs in this case.

rooms as the mobility-impaired plaintiffs. *Id.* at ¶ 32. The companion plaintiffs also were free to participate in the activities on board the ships, but instead decided to miss the activities to avoid leaving the mobility-impaired plaintiffs alone. *Id.* at ¶ 11 18. NCL argues that these circumstances are analogous to the situation in *Simenson v. Hoffman*, 1995 WL 631804 (N.D. Ill. 1995). In that case, the plaintiffs brought their disabled child to a medical facility for treatment. *Id.* at *1-2. When a physician at the facility saw the child, he refused to provide treatment and expelled the child and his parents from the facility. *Id.* The parents then alleged claims for associational discrimination based upon their expulsion. *Id.* at *2. Because the plaintiffs had sought only treatment for the child, the court held that the ejection from the facility did not constitute an injury to the plaintiffs separate from the denial of the child's treatment. *Id.* at *6. NCL contends that the companion plaintiffs have suffered a similarly indirect adverse effect in this case. *See also Micek*, 1999 WL 966970, at *3 (dismissing the associational discrimination claims of an employee whose insurance claims for speech therapy services for his disabled dependents were denied); *Niemeier v. Tri-State Fire Protection Dist.*, 2000 WL 1222207 (N.D. Ill.) (dismissing the associational discrimination claims of an employee whose insurance claims for treatments for his wife's infertility treatments were denied).

The plaintiffs respond that *Simenson* actually supports their claims for associational discrimination. They point out that other courts have held that non-disabled individuals may state claims for associational discrimination where those individuals sought benefits in addition to those sought by their disabled companions. For example, a court held that a non-disabled plaintiff had stated a claim for associational discrimination against a non-accessible sports facility where plaintiff alleged that he would attend events with his disabled child. *See Johanson v. Huizen Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fla. 1997). In another case, several non-disabled plaintiffs alleged claims for associational

discrimination against the state of Florida for failing provide mental health counseling to their deaf family members that was equivalent in quality to the counseling provided to non-deaf participants in the program. *See Tugg v. Towey*, 864 F. Supp. 1201 1203-04 (S.D. Fla. 1994). The court reasoned that the non-deaf plaintiffs had suffered separate injuries because they also received counseling services. *Id.* at 1208. In contrast, the court in *Simenson* found that the plaintiffs received no benefits from the defendants other than the medical treatment they sought for their disabled child. *See Simenson*, 1995 WL 631804, at *6.

After carefully considering this issue, the Court finds the companion plaintiffs' analogy more persuasive. Unlike the parents in *Simenson*, the companion plaintiffs sought to derive benefits from their stay on NCL's cruise ships that were independent from the benefits enjoyed by the mobility-impaired plaintiffs.[20] The companion plaintiffs took the cruises not only to accompany their disabled friends, but also to enjoy the cruise itself. *Cf. Johanson*, 963 F. Supp. at 1176 (permitting a non-disabled plaintiff to state an associational discrimination claim against a sports facility where he would attend events with his disabled child); *Tugg*, 864 F. Supp. at 1208 (permitting associational discrimination claims when the non-disabled plaintiffs also participated in the mental health counseling program at issue). In addition to this benefit, the companion plaintiffs sought to share cabins with their mobility-impaired traveling companions, a privilege commonly enjoyed by passengers traveling together on

[20] As the court noted in *Simenson*, the comments to 28 C.F.R § 36.205, which implements Title III's associational discrimination provision, suggest the following example: "if a place of public accommodation refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA." *Simenson*, 1995 WL 631804, at *6 (quoting 28 C.F.R pt. 36, App. B at 634 (2000)). This hypothetical is similar to the facts of this case, but is unhelpful because it does not address the possibility that the companions might have the option to enter the place of public accommodation without their disabled friend.

cruises. NCL, however, prohibited the companion plaintiffs from enjoying this privilege unless they paid the same allegedly discriminatory higher fee as the mobility-impaired plaintiffs. *See* Amended Compl. at ¶ 32. While NCL did not require the companion plaintiffs to pay extra to receive the benefit of enjoying the cruise, it forced them to pay more to enjoy the privilege of staying in the same rooms with their traveling companions, the mobility-impaired plaintiffs. Under the facts alleged in the amended complaint, the companion plaintiffs would not have incurred this additional fee but for their association with the mobility-impaired plaintiffs. Accordingly, the Court finds that the companion plaintiffs have stated claims for associational discrimination, and denies NCL's motion to dismiss.

III. The plaintiffs' request for sanctions.

Finally, the plaintiffs have requested an award of attorneys' fees from NCL as a sanction for filing the motion to dismiss. After considering the exhaustive and well-prepared briefing of all of the parties, the Court concludes that NCL's motion presented close questions of law that were not sufficiently frivolous to warrant sanctions. The plaintiffs' request is therefore denied.

Conclusion

Accordingly, the Court GRANTS NCL's motion to dismiss in part as follows: the Court dismisses the plaintiffs' claims seeking removal of physical barriers on NCL's cruise ships. The Court DENIES NCL's motion to dismiss the plaintiffs' remaining claims.

Signed this 9th day of September 2002.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-21154, 03-20056

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLEE.

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLANT.

Appeals from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC
(Opinion 1/12/04, 5 Cir., _____, ____F.3d _____)

Filed Feb. 10, 2004

Before REAVLEY, JONES, AND CLEMENT, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

APPENDIX D

STATUTES

The Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) provides in relevant part:

Section 12101. Findings and Purpose:

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and

practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

* * * *

Section 12181. Definitions
As used in this subchapter:

* * * *

(7) Public accommodation
The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--
(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
(B) a restaurant, bar, or other establishment serving food or drink;
(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(D) an auditorium, convention center, lecture hall,

or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

* * * *

(9) Readily achievable
The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include--
(A) the nature and cost of the action needed under this chapter;
(B) the overall financial resources of the facility or

facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

* * * *

Section 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or

separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals
For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings
Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate
Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods
An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration--

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association
It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination
For purposes of subsection (a) of this section, discrimination includes--

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can

demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or

accommodations available through alternative methods if such methods are readily achievable.

Section 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes--

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms,

telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator

Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

Section 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction

For purposes of subsection (a) of this section, discrimination includes--

(1) the imposition or application by a[1] entity described in subsection (a) of this section of

[1] So in original. Probably should be "an".

eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to--

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the

level of service provided to the general public;

(4) (A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent

feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

* * * *

Section 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

* * * *

(3) Standards

The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars

If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such

supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

APPENDIX D

CODE OF FEDERAL REGULATIONS

The Department of Justice's implementing regulations (28 C.F.R. Part 36) for the Americans with Disabilities Act provides in relevant part:

Section 36.104. Definitions:

For purposes of this part, the term--

* * * *

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

* * * *

Section 36.304. Removal of barriers:

(a) General. A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) Examples. Examples of steps to remove barriers include, but are not limited to, the following actions—

(1) Installing ramps;
(2) Making curb cuts in sidewalks and entrances;
(3) Repositioning shelves;
(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;
(5) Repositioning telephones;
(6) Adding raised markings on elevator control buttons;
(7) Installing flashing alarm lights;
(8) Widening doors;

(9) Installing offset hinges to widen doorways;
(10) Eliminating a turnstile or providing an alternative accessible path;
(11) Installing accessible door hardware;
(12) Installing grab bars in toilet stalls;
(13) Rearranging toilet partitions to increase maneuvering space;
(14) Insulating lavatory pipes under sinks to prevent burns;
(15) Installing a raised toilet seat;
(16) Installing a full-length bathroom mirror;
(17) Repositioning the paper towel dispenser in a bathroom;
(18) Creating designated accessible parking spaces;
(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
(20) Removing high pile, low density carpeting; or
(21) Installing vehicle hand controls.

* * * *

(d) Relationship to alterations requirements of subpart D of this part.

(1) Except as provided in paragraph (d)(2) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404-36.406 of this part for the element being altered. The path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(2) If, as a result of compliance with the alterations requirements specified in paragraph (d)(1) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove

the barrier that do not fully comply with the specified requirements. Such measures include, for example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the alterations requirements. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) Portable ramps. Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) Selling or serving space. The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

(g) Limitation on barrier removal obligations.

(1) The requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for alterations in subpart D of this part.

(2) To the extent that relevant standards for alterations are not provided in subpart D of this part, then the requirements of § 36.304 shall not be interpreted to exceed the standards for new construction in subpart D of this part.

(3) This section does not apply to rolling stock and other conveyances to the extent that § 36.310 applies to rolling stock and other conveyances.

Section 36.305. Alternatives to barrier removal:

(a) General. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

(b) Examples. Examples of alternatives to barrier removal include, but are not limited to, the following actions--

(1) Providing curb service or home delivery;

(2) Retrieving merchandise from inaccessible shelves or racks;

(3) Relocating activities to accessible locations;

(c) Multiscreen cinemas. If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

* * * *

Appendix B to Part 36--Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991):

Section 36.104. Definitions:

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Committee reports made clear that the definition of facility was drawn from the definition of

facility in current Federal regulations (see, e.g., Education and Labor report at 114). It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of "facility." Thus the requirements of subparts B and C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (§ 36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in § 36.301.

However, standards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

Requirements pertaining to accessible transportation services provided by public accommodations are included in § 36.310 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR part 37.

A public accommodation has obligations under this rule with respect to a cruise ship to the extent that its operations are subject to the laws of the United States.

The definition of "facility" only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. Public entities are subject to the requirements of title II of the Act. The Department's regulation implementing title II, which will be codified at 28 CFR part 35, addresses the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

APPENDIX E

FEDERAL REGISTER

The Department of Transportation's discussion (56 Fed. Reg. 45,584 (Friday, Sept. 6, 1991)) of its regulations implementing the Americans with Disabilities Act provides in relevant part:

[page 45,584]

SUPPLEMENTARY INFORMATION: This portion of the preamble discusses the basis and purpose of part 37. It also responds to comments on the Department's notice of proposed rulemaking on this subject issued April 4, 1991 (56 FR 13856) and highlights provisions in part 38, the Department's promulgation of the accessible vehicle specifications developed by the Architectural and Transportation Barriers Compliance Board.

* * * *

[page 45,599-45,600]

Section 37.109. Ferries and Other Vessels

As with the NPRM, this section is reserved in the final rule. The reason for this action is that, at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels. We note that the DOJ has determined that passenger vessels encompassing places of public accommodation (e.g., cruise ships, floating restaurants) are subject to the general nondiscrimination and policies and practices portions of its title III rule (Subparts B and C of 28 CFR part 36). The Department of Transportation anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels. The Department thanks commenters who provided information on this subject, which we will be using in this effort, along with information generated by a consultant the Department is

engaging to look into these matters.

The Department does want to make it clear its view that the ADA does cover passenger vessels, including ferries, excursion vessels, sightseeing vessels, floating restaurants, cruise ships, and others. Cruise ships are a particularly interesting example of vessels subject to ADA coverage.

Cruise ships are a unique mode of transportation. Cruise ships are self- contained floating communities. In addition to transporting passengers, cruise ships house, feed, and entertain passengers and thus take on aspects of public accommodations. Therefore cruise ships appear to be a hybrid of a transportation service and a public accommodation. As noted above, DOJ covers cruise ships as public accommodations under its title III rules.

In addition to being public accommodations, cruise ships clearly are within the scope of a "specified public transportation service." The ADA prohibits discrimination in the "full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce (Section 304(a)). "Specified public transportation" is defined by Section 301(10) as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."

Cruise ships easily meet the definition of "specified public transportation." Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce. Cruise ships operate according to set schedules or for charter and their services are offered to the general public. Finally, despite some seasonal variations, their services are offered on a regular and continuing basis.

Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they

are in U.S. ports, subject to treaty obligations. A state has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports.

We would point out that, even though the United States has territorial jurisdiction over foreign-flag vessels in its ports, its ability to enforce its domestic laws may be limited by treaty. This poses a problem only where the terms of a statute are in conflict with the terms of a treaty. No determination has been made about whether the provisions of the ADA are in conflict with any treaty. Before promulgating any specific requirements affecting foreign-flag ships, the Department would see if any treaty provisions (e.g., provisions of the Convention on Safety of Life at Sea) would conflict with ADA requirements. The Department would structure any regulatory requirements to avoid such conflicts.

Supreme Court, U.S.
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No. 03-1388

In The Supreme Court of the United States

DOUGLAS SPECTOR, *ET AL.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, apply to foreign cruise ships?

CORPORATE DISCLOSURE STATEMENT

The corporate parent of Norwegian Cruise Line Ltd. is Arrasas, Ltd., which in turn is wholly owned by Star Cruises PLC, a Malaysian company. Star Cruises PLC is a public company and its shares are traded on several foreign stock exchanges.

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RESPONSE TO PETITION FOR CERTIORARI

Certiorari is warranted to enable this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit and overrule the erroneous decision of the United States Court of Appeals for the Eleventh Circuit in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002).

STATEMENT

1. Respondent Norwegian Cruise Line Ltd. (NCL) operates a fleet of oceangoing cruise ships that depart on pleasure cruises from ports in the United States and, at present, two other continents.[1]

NCL welcomes disabled passengers on its ships. It has been NCL's experience that disabled persons often view cruises as ideal vacations because cruise ships offer numerous activities and services in a self-contained, accessible space. NCL is fully committed to making its many disabled passengers' cruise experiences as accessible, integrated, and enjoyable as possible. NCL rejects discrimination against its disabled passengers in any form.

2. Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, contains a lengthy and

[1] The implication that all NCL ships depart from U.S. ports (Pet. 3), is incorrect. Like most major cruise lines, NCL operates cruise ships that depart from ports in other countries and do not enter U.S. waters for the duration of the cruises. See, e.g., NCL's "Scandinavian Capitals" Itinerary, *available at* http://www.ncl.com/itinerary/it_euro.htm (last visited July 2, 2004).

exhaustive list of "public accommodations" and "specified public transportation" services subject to the statute. 42 U.S.C. §§ 12181(7), 12181(10). Foreign ships are not mentioned anywhere in this text, nor are they identified anywhere in the extensive legislative history of the statute. Moreover, there are no accessibility standards specific to ships, even though the Department of Justice – which has asserted that the statute should apply to foreign ships – recognized in 1991 that cruise ships are sufficiently different from land-based structures to require their own set of accessibility guidelines. See 56 Fed. Reg. 35544, 35550 (July 26, 1991).

3. Three of the petitioners are mobility impaired. (Amended Compl. ¶¶ 7-8.) Two of the petitioners are not mobility impaired but traveled with two mobility impaired petitioners during NCL cruises. (*Id.* ¶ 18.) Petitioners allege that they took cruises aboard the *Norwegian Star* and the *Norwegian Sea*. (*Id.* ¶¶ 11, 17.) The ships departed from the Port of Houston, Texas, traveled to foreign ports of call, and returned to Houston. (Pet. App. 2a.) Both ships sailed under the Bahamian flag. (*Id.*)

On August 1, 2000, petitioners filed this putative class action lawsuit in the district court on behalf of all "current and former" passengers of all NCL cruises who are mobility impaired or who had a "known association" with mobility-impaired passengers during the cruise. (Amended Compl. ¶ 23.) Petitioners assert that NCL's foreign cruise ships are governed by Title III of the ADA. (Pet. App. 2a.) Primarily, they allege that Title III requires NCL to make modifications to the physical structure of each of its ships. Petitioners seek modifications to the ships' cabins, restaurants, swimming pools, restrooms, elevators, and other unspecified structures. (Pet. 4; Amended Compl. ¶¶ 17, 31, 38.)

Petitioners also allege that they were subjected to alleged discriminatory onboard policies and procedures, for which they seek injunctive relief. (Pet. 4-5.)

Petitioners' allegations of discrimination are meritless. NCL does not discriminate against its many disabled passengers, and petitioners are no exception. NCL nevertheless recognizes that in the procedural context of the case, this Court must assume that petitioners' allegations are true. Thus, NCL proceeds by assuming, as it must (for the limited purpose of resolving the question presented here), the truth of petitioners' allegations regarding inaccessibility of certain areas of NCL ships and the content of certain NCL policies and procedures.[2]

4. In the district court, NCL moved to dismiss petitioners' complaint for failure to state a claim. NCL argued that Title III does not govern foreign ships because there is no evidence that Congress intended the statute to be applied to such ships. NCL argued that the application of Title III to foreign ships conflicts with comity principles and creates potential substantive conflicts with international conventions and foreign law. Also, a lack of guidance from Congress as to how the statute should be applied to foreign ships leaves cruise lines like NCL unable to determine in advance how to comply with the law.

In the alternative, NCL argued that petitioners' claims seeking the removal of structural barriers on NCL's ships must be dismissed because the federal agencies charged with promulgating architectural and design standards under Title III have never done so with respect

[2] In any event, these factual allegations are irrelevant for present purposes. The issue before this Court is a pure question of law.

ve ships – despite having had over a dozen years. NCL also argued that the non-mobility impaired petitioners' claims for "associational discrimination" fail because the non-mobility impaired petitioners do not allege that they were singled out for discrimination.

The district court, relying on the Eleventh Circuit's opinion in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002), held that Title III applies to foreign ships within the territorial waters of the United States. (Pet. App. 35a.) The district court nevertheless dismissed petitioners' barrier removal claims, recognizing that the lack of architectural standards specific to ships destroys Congress's goal in Title III of establishing uniformity in aspects of the design and structure of public accommodations. (*Id.* 42a.) The lack of standards also leaves cruise ships unable to determine what is required by the statute. (*Id.*) Finally, the court permitted the non-mobility impaired petitioners to proceed on their claims for "associational discrimination." (*Id.* 46a-47a.)

5. Citing 28 U.S.C. § 1291(a), petitioners filed a notice of appeal challenging the district court's dismissal of their barrier removal claims. Separately, NCL sought certification of the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b) so that it could seek review of the court's ruling that Title III applies to foreign ships. The district court certified its order for interlocutory appeal under section 1292(b), finding two questions of law to be controlling: "(1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's

existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships."[3] (Resp. App. 4.) NCL received the court of appeals' permission to pursue its separate appeal on these issues. The Fifth Circuit ultimately consolidated the two appeals.

The Fifth Circuit held that "[f]oreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so." (Pet. App. 15a.) The court observed that although the United States has the raw power to subject foreign ships to its laws, whether it exercises that power is within Congress's discretion. (*Id.* 4a-5a.) For a court to apply a statute to a foreign ship, there must be specific and clear evidence in the statute or its legislative history indicating Congress's intent to do so. (*Id.* 7a-8a, citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).) As the court of appeals stated, "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." (Pet. App. 8a.)

The Fifth Circuit found no evidence that Congress had intended that Title III apply to foreign ships. (*Id.* 8a.) The court also noted the potential conflict between the requirements of Title III and the international convention governing maritime architecture, the International Convention for the Safety of Life at Sea (SOLAS), 32 U.S.T. 47, T.I.A.S. No. 9700 (1974). (Pet. App. 8a-9a.)

---

[3] The courts below referred to the ships at issue as "foreign-flagged ships" or "foreign-flagged cruise ships." In this Response, NCL uses the more concise term "foreign ships," which has the same meaning, *i.e.*, ships registered in a foreign country.

The Fifth Circuit rejected the Eleventh Circuit's contrary ruling in *Stevens*. The court first disagreed with the Eleventh Circuit's refusal to apply the presumption against the application of U.S. statutes to foreign ships. (*Id.* 12a-13a.) Although the Eleventh Circuit had held this presumption to be applicable only to labor relations laws (*id.*), the Fifth Circuit observed that petitioners' requested relief – which encompasses structural modifications, policy changes, and changes in crewmember duties – would affect the "internal management and affairs" of the ships no less than would labor relations laws. (*Id.* 13a.) Thus, in contrast to *Stevens*, the Fifth Circuit found the presumption in *Benz* and *McCulloch* to be applicable to the instant question. (*Id.* 12a-13a.)

The circuits also differed over the question whether application of Title III would require an impermissible extraterritorial application of the statute. (*Id.* 10a-11a, 13a.) Whereas the *Stevens* court found no requested extraterritorial application (215 F.3d at 1242), the Fifth Circuit believed it to be obvious that the permanent modifications to ship structure and policies sought under Title III would necessitate an extraterritorial application once the ships left U.S. waters. (Pet. App. 11a-13a.) This would be impermissible because there is no evidence that Congress intended the statute to apply extraterritorially. (*Id.*)

The two circuits also disagreed whether Title III should be narrowly construed to avoid potential conflicts with international law. The Eleventh Circuit declined to consider the effect of potential conflicts of law, ruling that conflicts were appropriately considered only when specific conflicts between the plaintiffs' requested relief and international law had been proven. *Stevens*, 284 F.3d at

1187. In contrast, the Fifth Circuit, explicitly rejecting the Eleventh Circuit's approach (Pet. App. 12a n.9), held that potential conflicts affect the manner in which the statute should be interpreted. (*Id.* 8a.) Because of the possibility of conflict between Title III and SOLAS, the court ruled that Title III should not be interpreted to include foreign ships. (*Id.* 9a.)

Neither the Fifth Circuit nor the Eleventh Circuit held, as petitioners claim (Pet. 1, 9, 11, 12 & n.2, 21, 22), that Title III could never be applied to the conduct of the operators of foreign cruise ships that do business in the United States. Neither court had occasion to consider the circumstances under which Title III applies to services provided by land-based accommodations operated by foreign companies, as the claims in both cases related only to the services offered by foreign cruise ships. (Pet. App. 2a; *Stevens*, 215 F.3d at 1240, 1243.)

In an unpublished order, the Fifth Circuit denied petitioners' petition for rehearing en banc. (Pet. App. 48a-49a.)

6. On April 1, 2004, petitioners sought a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

Although petitioners and NCL disagree about many aspects of the case, including both the question presented and the proper answer to that question, NCL agrees that this is an important case raising a significant issue of federal law that this Court should decide.

I. This Case Presents the Question Whether Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, Applies to Foreign Cruise Ships.

NCL agrees that the Court should decide this case, but it is important to recognize the correct issue raised by petitioners' allegations and addressed by the courts below. The proper question before this Court is not, as petitioners claim, whether Title III applies to "companies" that operate foreign cruise ships. (Pet. i.) Nor is the question "whether Title III applies to the on-land conduct of companies that operate foreign-flag ships." (*Id.* 11.) Nor is the question generally "whether U.S. citizens enjoy the protection of U.S. law when they contract to take a cruise that originates in a U.S. port and is operated by a company whose principal place of business is the United States." (*Id.* 15.) All of these questions are overbroad and misstate the relevant issue.

Title III governs "place[s] of public accommodation," 42 U.S.C. § 12182(a), and "specified public transportation services," 42 U.S.C. § 12184(a), as those terms are defined by the statute. Because statutory coverage is determined on a place-by-place or transportation service-by-service basis, it is incorrect to ask whether the statute applies to particular operators such as NCL.[4] In view of the statutory

[4] The threshold issue under Title III is whether a place of public accommodation is involved. The role assigned to an "operator" under the statute is to ensure that a place of "public accommodation," as defined by the statute, complies with the statutory non-discrimination requirements. See 42 U.S.C. § 12182(a). An operator of one place of public accommodation does not become subject to Title III with respect to *all* structures that it operates. Even the Department of Justice and the *Stevens* court – each of which has otherwise taken an overly

(Continued on following page)

language, the precise issue in this case is whether Title III applies to "place[s] of public accommodation" on foreign cruise ships or to "specified public transportation services" offered by foreign cruise ships.[5] Asking whether Title III applies to foreign cruise ships is a convenient and accepted shorthand for this more precise formulation of the question.

The courts below consistently recognized that the issue before them was whether Title III applies to foreign cruise ships – not whether Title III applies to the operators of foreign cruise ships. The opening sentence of the Fifth Circuit's opinion declares that the case "presents the question whether Title III [of the ADA] applies to foreign-flagged cruise ships." (Pet. App. 2a.) The issue is described in virtually the same terms throughout the opinion.[6] And

expansive view of Title III's scope – recognize this fundamental proposition. See United States Department of Justice, ADA Title III Technical Assistance Manual III-1.2000 (1993), *available at* http://www.usdoj.gov/crt/ada/taman3.html (last visited July 2, 2004); *Stevens*, 215 F.3d at 1241 & n.5. Conversely, an operator does not become wholly exempt from Title III merely because some of its structures are not public accommodations as defined by the statute.

[5] Petitioners do not bring any claims relating to land-based accommodations that NCL may own or operate, or to land-based transportation services that NCL might have provided. All of the claims relate to the accommodations and services on the *Norwegian Star* and the *Norwegian Sea*. See also *infra* note 8 (discussing petitioners' argument regarding NCL's "on-land pricing policies").

[6] See, e.g., Pet. App. 3a n.2 ("we conclude that Title III of the ADA does not apply to foreign-flagged cruise ships"); *id.* 4a ("NCL challenges the district court's conclusion that Title III of the ADA applies to foreign-flagged cruise ships."); *id.* 4a ("no evidence that Congress intended Title III to apply to foreign-flagged vessels"); *id.* 4a n.3 ("we . . . limit this decision to foreign-flagged cruise ships"); *id.* 5a (describing the issue as whether "to apply domestic law to foreign vessels"); *id.* 8a ("Congress may enact legislation that governs foreign-flagged cruise

(Continued on following page)

in its Conclusion, the court of appeals summarizes its holding with the statement that "[f]oreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so." (*Id.* 15a.)

There is no basis for petitioners' contrary characterization of the Fifth Circuit's decision. In the opening paragraph of their argument, for example, petitioners assert that the decision below applies "to foreign-flagged cruise ships *and their operating companies*." Pet. 9 (citing Pet. App. 14a-15a) (emphasis added). The cited portion of the opinion, however, mentions only "foreign-flagged cruise ships"[7] (three times); it says nothing about the companies that operate these vessels. Petitioners then assert without citation that this case involves not only foreign cruise ships but also "their parent companies" (Pet. 11), "their operating companies" (*id.*), the "companies that operate" them (*id.*), "a company that operates" them (*id.* at 12 n.2), and "foreign-flag cruise *lines*" (*id.* at 21) (emphasis in original). But in fact the Fifth Circuit never mentions "parent companies" or the companies that operate foreign cruise ships, and it mentions a cruise line only when it names NCL as a party to the action. (Pet. App. 2a.)[8]

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ships"); *id.* 14a-15a ("application of Title III to foreign-flagged cruise ships is impermissible").

[7] The cited portion of the opinion includes six additional references to "cruise ships" without specifying their nationality (or mentioning their operators). (Pet. App. 14a n.10.)

[8] Petitioners criticize the Fifth Circuit for having "dismissed [their] claims that [NCL's] on-land pricing policies violate Title III." (Pet. 21.) This criticism appears to be an indirect argument that the court of appeals implicitly held that Title III does not apply to the operators of foreign cruise ships. But petitioners misunderstand the scope of Title

(Continued on following page)

Even petitioners recognized the proper issue in the court below. Petitioners' argument on this issue appears under the heading "THE ADA APPLIES TO NCL'S FOREIGN-FLAGGED SHIPS" (Pet. CA5 Reply Br. 5), and they consistently phrased their argument in these terms (see *id.* at 5-25).

The district court was equally clear that the relevant issue was whether Title III applied to foreign cruise ships. Not only did its opinion characterize the issue as "whether the ADA applies to foreign-flagged cruise ships" (Pet. App. 19a), but in its order permitting NCL to seek an interlocutory appeal, it framed the relevant controlling question of law as "whether Title III of the ADA applies to foreign-flagged cruise ships." (Resp. App. 4.)

It is also noteworthy that in *Stevens v. Premier Cruises, Inc.* – the case whose clear conflict with the decision below justifies this Court's grant of certiorari – the Eleventh Circuit addressed only whether Title III applies to foreign cruise ships.[9] As with the decision below,

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III. NCL's so-called "on-land pricing policies" could not violate Title III unless they relate to "place[s] of public accommodation," 42 U.S.C. § 12182(a), or "specified public transportation services," 42 U.S.C. § 12184(a), as those terms are defined by the statute. The only "on-land pricing policies" that petitioners challenge in this case relate to NCL's foreign cruise ships. As the statutory language reveals, the correct question is whether Title III applies to these foreign vessels.

In any event, petitioners did not argue below that NCL's pricing policies were unrelated to NCL's foreign cruise ships because they were "on-land." As the courts below never had the opportunity to address this argument, it has been waived.

[9] Indeed, the Eleventh Circuit was very clear that the question before it was whether the "public accommodations" on a foreign cruise ship are subject to Title III. The court carefully explained why parts of a

(Continued on following page)

there was no consideration of whether Title III applies to the companies that operate foreign cruise ships.

Petitioners' complaint demands an answer to the question whether Title III applies to foreign cruise ships; the case does not raise any issue about the applicability of Title III to the companies that operate them. Throughout the proceedings in the district court and the court of appeals, everyone involved clearly understood the scope of the fundamental question regarding the applicability of the statute. This Court should now answer that question. Petitioners should not be permitted to raise new issues that were not mentioned or decided below, and that the case does not present. NCL therefore respectfully requests that certiorari be granted solely with respect to the question that the case does present – whether Title III applies to foreign cruise ships.[10]

II. The Acknowledged Conflict Between the Fifth and Eleventh Circuits Unacceptably Subjects Foreign Cruise Ships to Inconsistent Legal Standards.

As petitioners observe, the majority of United States cruises depart from ports in the Fifth and Eleventh

cruise ship that did not qualify as "public accommodations" were not subject to Title III. See 215 F.3d at 1241 & n.5.

[10] This Court has not hesitated, in an appropriate case, to rephrase the question presented by a petitioner. See, e.g., *Clay v. United States*, 536 U.S. 981 (2002); *Miller-El v. Cockrell*, 535 U.S. 903 (2002); *Hope v. Pelzer*, 534 U.S. 1120 (2002); *Becker v. Montgomery*, 531 U.S. 1110 (2001). In order to focus the parties' attention during briefing on the actual question that this Court would be called upon to decide, the Court should rephrase petitioners' question here.

Circuits. (Pet. 12.) The circuit split between the Fifth and Eleventh Circuits[11] means that most foreign cruise ships, including NCL's ships, are subject to two different legal regimes affecting their structure and onboard policies. When sailing to or from ports in the Fifth Circuit, foreign cruise ships must comply with the law of the flag state. At a bare minimum, this law includes the existing set of design, operations, and equipment standards contained in SOLAS, which has been ratified by nearly every seafaring nation, including the Bahamas. See United States Department of State, Treaties in Force 423-24 (2003); see also, e.g., *United States v. Locke*, 529 U.S. 89, 102-03 (2000); *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1079 (CA2 1993).

In the Eleventh Circuit, by contrast, foreign cruise ships must comply with flag-state obligations and with Title III. Of course, the lack of any accessibility standards under Title III for cruise ships makes it impossible to know what may be required. Yet even playing the guessing game necessitated by this vagueness, certain courts could interpret the statute to require some form of accessibility-related structural modifications to the ships. (Pet. App. 13a.) Title III may also be read to require cruise ships to change crewmember duties and to implement, rescind, or

[11] The United States District Court for the Northern District of California recently considered the question presented in this case and, like the Fifth Circuit below, held that Title III does not apply to foreign ships. See *Giacopini v. Crystal Cruises, Inc.*, Case No. C-04-1089MMC (N. D. Cal. June 25, 2004). After reviewing the analysis in both *Stevens* and *Spector*, the *Giacopini* court found "the detailed analysis set forth in *Spector* to be persuasive and, for the reasons set forth in *Spector*," found "that Title III of the ADA has no applicability to foreign-flag cruise ships." (Slip Op. at 10.)

modify onboard policies and procedures. (*Id.*) If the current circuit split is unresolved, whether a cruise ship must account for these unknown potential requirements depends solely upon the court that decides the case.

A circuit split is particularly intolerable in this case because cruise ships move from jurisdiction to jurisdiction as cruise lines change their itineraries. For example, the ship primarily at issue in this case – the *Norwegian Sea* – left the Houston market in December 2000, sailed other itineraries in other jurisdictions, and then returned to Houston in November 2003. See Harry Shattuck, *NCL's Texarribean Cruises Will Resume in November*, Houston Chronicle, October 26, 2003, Travel section, at 6. As a practical matter, most, if not all, of the modifications that could be sought by plaintiffs under Title III are likely to remain in place even when the ship sails to another jurisdiction. To the extent that Title III requires structural modifications, ships would have little choice but to comply with this aspect of Title III at all times, whether in domestic or foreign jurisdictions, if there is any chance that they might sail to the Eleventh Circuit.

III. This Court Should Overrule the Eleventh Circuit's Erroneous Decision in *Stevens* in Favor of the Fifth Circuit's Ruling Below.

This case provides the Court with the ideal opportunity to overrule the erroneous *Stevens* decision. Until *Stevens* is overruled, it will continue to create intolerable problems for the cruise line industry.

As the Fifth Circuit correctly recognized, the flag state presumptively determines the law onboard a ship, even when the ship calls in the ports of other nations. See, e.g.,

Restatement (Third) of the Foreign Relations Law of the United States §§ 501, 502 cmt. a. This well-established principle of maritime and international law prevents unintended clashes between port states and flag states over the governance of oceangoing ships. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578-82 (1953). It also furthers maritime commerce by protecting ships from becoming subject to multiple, and perhaps conflicting, sets of laws. See, e.g., *id.* at 585.

The legislature, not the courts, decides whether and under what circumstances the United States will disregard this principle when foreign ships enter U.S. waters. In deference to Congress, courts do not apply U.S. law to foreign ships unless Congress has specifically expressed its intent that the statute apply to such ships. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The Fifth Circuit correctly found no evidence that Congress intended Title III to apply to foreign ships. (Pet. App. 8a.) It also found a potential for conflict between the requirements of Title III and SOLAS, the international convention governing ship structure and design. (*Id.* 8a-9a.) Further, the court correctly observed that the application of Title III to foreign ships would necessitate an impermissible extraterritorial application of the statute when those ships left U.S. waters. (*Id.* 10a-11a, 13a, citing *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244 (1991).) For these reasons, the court properly declined to adopt petitioners' expansive reading of Title III to regulate foreign ships.

The contrary *Stevens* decision reached the wrong result and should be overruled. The Eleventh Circuit first erred by finding the canon of construction in *Benz* and *McCulloch* – requiring "specific language" and a "clear express[ion]" of congressional intent to apply a statute to foreign ships – to be inapplicable in the context of Title III. According to the Eleventh Circuit, *Benz* and *McCulloch* apply only to statutes that affect the "internal management and affairs" of the ship. *Stevens*, 215 F.3d at 1242. A ship's "internal affairs," according to the *Stevens* court, include labor relations between the crew and the shipowner, but remarkably not the ship's structure, policies, and crewmember duties. *Id.*

The *Stevens* court misunderstood and misread *Benz* and *McCulloch*. The purpose of the presumption that this Court announced in those cases is to reserve to Congress the exclusive authority to determine whether and when the United States will interfere with another nation's exercise of its sovereign power over its ships. *Benz*, 353 U.S. at 144; *McCulloch*, 372 U.S. at 20. The *Stevens* court erred by failing to recognize that the potential to interfere with matters governed by the flag state exists not only with respect to labor relations, but also to modifications of a foreign ship's structure, policies, and crewmember duties. (Pet. App. 13a.)

The Eleventh Circuit also erred by dismissing *EEOC v. ARAMCO* as inapplicable. See *Stevens*, 215 F.3d at 1242. It overlooked the obvious fact that the plaintiff's requested relief – which included permanent structural modifications and policy changes – would require enforcement of Title III outside United States waters, including in foreign ports of call. This relief plainly would require an extraterritorial application of the statute. *ARAMCO*

controls and, like *Benz* and *McCulloch*, holds the statute inapplicable. (Cf. Pet. App. 10a-11a.)

Further, the Eleventh Circuit misunderstood the effect of the potential conflicts between application of Title III and other law. As a matter of statutory construction, statutes should be interpreted to minimize potential conflicts with international and foreign laws. Thus, consistent with the presumptions articulated in *Benz*, *McCulloch*, and *ARAMCO*, Title III should be narrowly construed to exclude foreign ships.

In sum, the *Stevens* decision is poor law for many reasons. It requires courts to ignore congressional silence and thus disregard comity principles that might otherwise call for restraint; it risks a conflict of laws between Title III and international and foreign laws; and it subjects cruise lines to significant potential liability without the guidance from Congress that would have, and should have, been provided had the statute been intended to regulate foreign ships.

CONCLUSION

The petition for a writ of certiorari should be granted solely with respect to the question whether Title III applies to foreign cruise ships.

Respectfully submitted,

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July 6, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS SPECTOR, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION**
NORWEGIAN CRUISE LINE LIMITED d/b/a NORWEGIAN CRUISE LINE,	§	**NO. H-00-2649**
	§	
Defendant.	§	

ORDER

Pending before the Court are Plaintiffs' motion for entry of final judgment (Dkt. #35), Defendant's motion to certify order for appeal and stay the remaining litigation (Dkt. #37), and Defendant's motion to stay the remaining litigation pending resolution of Plaintiffs' appeal (Dkt. #39). After careful consideration of the parties' arguments and the applicable law, the Court hereby DENIES Plaintiffs' motion and GRANTS Defendant's motions, for the reasons explained below.

Discussion

On September 10, 2002, this Court entered a Memorandum & Order (Dkt. #32) granting in part and denying in part Defendant's motion to dismiss Plaintiffs' claims. Specifically, the Court dismissed Plaintiffs' claim for injunctive relief against Defendant seeking removal of physical barriers to existing facilities on Defendant's ships. The Court denied Defendant's motion to dismiss

Plaintiffs' remaining claims. On September 24, 2002, Plaintiffs asked the Court to enter final judgment as to the dismissed claim pursuant to Federal Rule of Civil Procedure 54(b). Defendant timely filed its response asking the Court to deny the motion, or, in the alternative, certify the Court's September 10th order for appeal under 28 U.S.C. § 1292(b) and stay the litigation pending appeal. On October 8, 2002, Plaintiffs notified the Court that they were pursuing an appeal under 28 U.S.C. § 1292(a)(1) of the Court's dismissal of the claim for injunctive relief. As a result, Defendant has asked the Court to stay the pending litigation until resolution of the 28 U.S.C. § 1292(a)(1) appeal.

Defendant maintains that it would be improper for the Court to enter final judgment as to Plaintiffs' dismissed claim for injunctive relief. Federal Rule of Civil Procedure 54(b) provides in relevant part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Under this Rule, a district court may enter final judgment if it determines both that there is no just reason for delay and that it is "dealing with a 'final judgment.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980). In making this determination, the district court must consider "whether the claims under review [are] separable from the others remaining to be adjudicated." *Id.* at 8. It should be the goal of the district court to prevent an

appeals court from having "to decide the same issues more than once even if there were subsequent appeals." *Id.*

The Court is of the opinion that entry of final judgment would be improper in this case. In dismissing Plaintiffs' claim for injunctive relief, the Court determined that federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's[1] existing barrier removal guidelines. The Court's determination with respect to barrier removal was predicated on a finding that Title III of the ADA applies to foreign-flagged cruise ships, such as those owned and operated by Defendant. Accordingly, the Court finds that Plaintiffs' claim seeking barrier removal of Defendant's ships is not entirely separable from the remaining claims in this case. Rather, all of Plaintiffs' claims are connected by the underlying assertion that Title III of the ADA applies to foreign-flagged cruise ships. Accordingly, the Court denies Plaintiffs' motion for entry of final judgment.

The Court, however, does believe that an immediate appeal is appropriate in this case. The Court is of the opinion that 28 U.S.C. § 1292(b) provides the proper mechanism for such an appeal. That statute states:

> When a district judge, in making in a civil action an order not otherwise appealable in this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and

[1] Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*

> that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall state so in writing in such order.

In its September 10th Order, the Court admitted that Defendant's motion to dismiss presented difficult issues, which various district courts have resolved in different ways. In particular, the Court believes that there is substantial ground for difference of opinion on two of the Court's findings in this case: (1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships.

The Court is of the opinion that an appeal of the unsettled questions of law described above "may materially advance the ultimate termination of the litigation" in this case. *See* 28 U.S.C. § 1292(b). Therefore, the Court finds that an immediate appeal under Section 1292(b) would be appropriate. The Court believes that such an appeal is the most efficient way to achieve the correct legal result in this case. Accordingly, the Court grants Defendant's motion to certify the Court's September 10, 2002 Order for immediate appeal under 28 U.S.C. § 1292(b).

Conclusion

For the foregoing reasons, Plaintiffs' motion for entry of final judgment is DENIED. Defendant's motion to certify the Court's September 10, 2002 order for appeal and to stay the litigation is GRANTED. Defendant's

motion to stay the litigation pending resolution of Plaintiffs' Section 1292(a)(1) appeal is GRANTED. It is therefore ORDERED that all litigation in this cause of action shall be STAYED pending resolution of Plaintiffs' Section 1292(a)(1) appeal and any Section 1292(b) appeals of the Court's September 10, 2002 Order.

It is so ORDERED.

Signed this 26th day of November, 2002.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

(5)

Supreme Court, U.S.
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No. 03-1388

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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PARTIES TO THE PROCEEDING BELOW

Petitioners advise the Court that named petitioner Rodger Peters has died.

REPLY BRIEF FOR THE PETITIONERS

The parties and their *amici* all agree that this case presents a square conflict over an important and recurring question of federal law and that it provides an appropriate vehicle for this Court to resolve the issue. Petitioners accordingly will reply only to respondent's extended argument regarding the framing of the question presented.

As set forth in the Petition, the case presents the question "[w]hether and to what extent Title III of the Americans With Disabilities Act applies to companies that operate foreign-flag cruise ships in United States waters?" Pet. i. Respondent urges this Court to rewrite the question with "a convenient and accepted shorthand" as "whether Title III [of the ADA] applies to 'place[s] of public accommodation' on foreign cruise ships or to 'specified public transportation services' offered by foreign cruise ships." Response 9.

Respondent's proposed formulation unjustifiably narrows the issues raised in this case. Petitioners' complaint challenges more than their exclusion from particular "place[s] of public accommodation" or the physical accessibility of "specified public transportation services" on respondent's ships. Petitioners allege also that respondent discriminates against people with disabilities and their companions in its pricing, see Pet. 1, 4 (citing Amended Complaint ¶ 17); that respondent discriminates against people with disabilities in its requirement that all disabled customers travel with an able-bodied companion (at full fare) even if the disabled passenger is fully self-sufficient, see Petrs. C.A. Br. 5 & n.2; and that respondent discriminates against both disabled passengers and their companion passengers in the services and facilities it makes available on board its ships, see Pet. 4-5 (citing Amended Complaint ¶ 18).

All these issues were addressed by the courts below. After the district court held that petitioners' non-barrier-related allegations stated a claim under Title III of the ADA (see Pet. 5 (citing Pet. App. 28a, 47a)), the Fifth Circuit

reversed. Particularly relevant here, the court of appeals held that petitioners could not state a claim under Title III *in any respect*; it drew no distinction between the physical accessibility of respondent's ships and petitioners' remaining ADA claims. See Pet. App. 15a ("we reverse the district court to the extent that *any* Title III ADA claims remained" (emphasis added)).[1]

[1] Respondent's passing contention in a footnote (Response 11 n.8) that petitioners have somehow waived this argument is meritless. The only claims dismissed by the district court were petitioners' barrier removal claims. Petitioners, therefore, were the *appellees* with respect to their remaining claims and could not have waived these claims by failing to raise them on appeal. Petitioners nonetheless fully preserved in the Fifth Circuit their claims that clearly did not involve the extraterritorial application of the ADA. *E.g.*, Petrs. C.A. Br. 5 & n.2 ("NCL requires its disabled customers to travel with a companion (at full fare) regardless of whether the disabled passenger is self-sufficient. This practice is only one of the many discriminatory selection and eligibility criteria applied to passengers with disabilities."); *id.* at 6 ("mobility-impaired passengers are continually and consciously subjected to discriminatory policies, practices, and treatment by NCL, including * * * NCL's deliberate and conscious practice of charging disabled passengers (and their *required* traveling companions) higher fares than non-disabled passengers and other illegal surcharges for reasonable accommodations"); Petrs. C.A. Reply 23-24 ("Moreover, not all of the relief that Plaintiffs seek would 'have to be enforced outside of United States territory.' *See NCL's Brief* at 21. In that regard, Plaintiffs requested relief that includes such items as requiring NCL to (i) refrain from its current practice of charging disabled passengers (and their required traveling companions) higher fares than non-disabled passengers; (ii) refrain from offering NCL services for sale to persons with disabilities which are not accessible to persons with disabilities; (iii) refrain from imposing eligibility criteria that are not applied to passengers who are not disabled; and (iv) include its mobility-impaired passengers in the emergency evacuation plans and provide those passengers with a means of evacuation. [7 R. 19] Clearly, this conduct takes place in the United States and its territorial waters.").

Given the scope of petitioners' complaint and the court of appeals' ruling, respondent's proposed reformulation of the question presented is too narrow. Some of the policies petitioners challenge as violative of Title III occur entirely on land – for example, respondent's pricing practices – and respondent's reformulation may exclude those issues. Other policies involve the treatment of the disabled petitioners' able-bodied companions and thus do not involve questions of physical accessibility at all. The failure to include those aspects of petitioners' complaint within the question presented would commit this Court (like the court of appeals) to mistakenly concluding that if for some reason the barrier-removal requirements of Title III do not apply to foreign-flagged cruise ships, the cruise line is thereby left free to discriminate against people with disabilities and their companions in its pricing decisions and in the services it offers even if nondiscrimination would require no ship-board modifications at all.

In support of its attempt to narrow the question presented, respondent observes that this case does not involve "the circumstances under which Title III applies to services provided by *land-based accommodations* operated by foreign companies" (Response 7 (emphasis added)). That observation is entirely beside the point. Petitioners have never contended that the case presents any such issue, and the Court accordingly would not decide it.

CONCLUSION

Certiorari should accordingly be granted with respect to the question presented as framed by the Petition for Certiorari.

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July 21, 2004[2]

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No. 03-1388

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vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* INTERNATIONAL COUNCIL OF CRUISE LINES IN SUPPORT OF RESPONDENT

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INTRODUCTION

The International Council of Cruise Lines ("ICCL") strongly advocates accessibility aboard cruise ships for individuals with disabilities, neither supports nor endorses discriminatory practices or procedures, and embraces the policy considerations underpinning the Americans With Disabilities Act ("ADA"). Nonetheless, Congress's failure to express its intent to apply Title III of the ADA to ships built and registered abroad, and that embark and call in countless foreign nations, has caused great uncertainty over accessibility standards when these ships embark in the U.S. The additional regulatory void resulting from the failure of the U.S. Department of Transportation ("DOT") or the Department of Justice ("DOJ") to promulgate any accessibility regulations in the cruise industry has resulted in a quagmire for ship owners, passengers, travel agents and the judiciary nationwide. The Fifth and Eleventh Circuits' conflicting rulings regarding the ADA's application to foreign ships have greatly compounded the confusion created by the lack of any legislative or regulatory mandate, requiring clarification by this Court.

INTEREST OF *AMICUS CURIAE*[1]

The ICCL, based in Arlington, Virginia, is the leading nonprofit trade association representing the interests of its 16 member cruise lines and more than 95 associate member companies in a diverse array of domestic and international

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[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation or submission.

forums. ICCL's members include the largest passenger cruise lines trading in hundreds of ports around the globe, and among its associate members are leading industry suppliers and strategic business partners. Each year ICCL's overnight cruise ship operators carry more than ten million passengers on over 115 ships, the largest of which transport more than thirty-five hundred guests per voyage. In addition to carrying U.S. citizens, ICCL vessels embark many foreign citizens, both in the U.S. and abroad.

The cruise industry's responsiveness in providing equal, integrated access to all its guests has generated a substantial and growing percentage of those traveling with special needs. For many years ICCL member lines have provided access for persons with mobility restrictions, communication impairments, chronic illnesses and other conditions which could be termed "disabilities" under the ADA. Despite the unique challenges invariably encountered in the shipboard environment, ICCL cruise ships routinely accommodate wheelchairs, electric mobility devices and service animals; provide wheelchair-accessible cabins and public areas, and communication auxiliary aids; and have modified practices and procedures in an effort to accommodate all guests. However, numerous technical issues are associated with harmonizing accessibility standards and internationally mandated construction and safety requirements for ships engaged in international commerce.

Title III of the ADA, governing public accommodations, does not extend U.S. accessibility standards to guests on foreign ships. Neither the DOT nor DOJ has implemented any regulations under Title III governing accessibility on passenger vessels. These agencies have indicated that before promulgating regulations for foreign ships, potential conflicts with international design, construction and operational standards must first be reconciled. The complete absence of any statutory or regulatory framework for applying Title III to

foreign ships raises serious practical issues not addressed by petitioners. Although petitioners declined to raise the impact of the absence of regulations in addition to any expression of congressional intent, *Amicus* would ask the Court to consider this aspect of the issue presented in the Petition, namely the *extent* to which the ADA *can* be applied in its present form.

In the international arena, ICCL works with leading flag and port state administrations, shipping associations, classification societies, lawmakers and regulators, both in the U.S. and abroad, on technical, safety, security and environmental issues. The International Maritime Organization ("IMO"), an agency of the United Nations, reviews current maritime issues and sets international law by adopting conventions and treaties among its 163 member nations. The IMO is responsible for establishing global standards for cruise ship safety, design and construction. ICCL serves as a Non-Governmental Organization in consultative status to the IMO. Over the years representatives of ICCL's experienced technical and legal committees and working groups have actively participated in IMO deliberations, including the development of several conventions. One of the most significant ones was the International Convention for the Safety of Life at Sea ("SOLAS") (32 U.S.T. 47, T.I.A.S. No. 9700 (1974)), which was ratified by the United States and mandatorily governs ship design, construction and operation.

Seeking to foster the creation of uniform and specific accessibility standards for its members' ships, ICCL has also participated directly in that regulatory process, both at the national and international level. ICCL was heavily involved in the IMO Maritime Safety Committee and working group that in 1996 formulated and adopted worldwide passenger vessel guidelines addressing design and operation features for accommodating persons with disabilities. In the United States, from 1998 through 2000, ICCL representatives were members and/or participants of the Passenger Vessel Access

Advisory Committee ("PVAAC"), established by the United States Architectural and Transportation Barriers Compliance Board ("U.S. Access Board"). The Committee's objective was to provide recommendations regarding accessibility onboard passenger ships.

To date, however, Congress has never clarified whether or to what extent Title III applies to foreign vessels. No accessibility guidelines or regulations have been adopted in the United States for cruise ships in the 14 years since the ADA was enacted.

SUMMARY OF ARGUMENT

Of the more than 100 foreign cruise ships visiting the North American continent annually, some routinely embark passengers in U.S. ports, others do so occasionally, and several only rarely schedule U.S.-based voyages. The ships vary in size, age, nation of construction and registry. The confusion over the extent of the ADA's application in these varied contexts has fomented litigation in many jurisdictions by advocacy groups and individuals who, regardless of their good intentions, seek to impose their own accessibility standards on this international industry. Judges in various jurisdictions are being forced to guess what Congress and the regulatory agencies intend to be the required level of accessibility. The lawsuits have resulted in inconsistent rulings on the extent of the ADA's application, and forum shopping by attorneys who are awarded fees if they prevail in prosecuting these actions.

Nowhere in Title III has Congress stated or implied that the statutory scheme was meant to be applied extraterritorially, to foreign facilities that visit the U.S. or are visited by American citizens. The legislative history is likewise devoid of any such intent or discussion. Congress evidently never considered the potential for a foreign facility, such as a

cruise ship, to relocate to the U.S. on a long-term, temporary or only occasional basis, and therefore never addressed the reach of Title III at sea. Absent an expression of Congress's intent, ignoring the well-established presumption against extraterritorial application of U.S. laws under these complex circumstances is unprecedented.

Petitioners' assumption that Congress must have intended extraterritorial application of the ADA, or that application to foreign ships when in U.S. waters is not "extraterritorial," is unsupported. Contrary to petitioners' suggestion, accessibility onboard foreign ships clearly implicates the "internal affairs" of every vessel, even during the periods they enter U.S. waters, given the plethora of foreign and international laws within which these same ships must function.

Congress directed both the DOT and DOJ to enact specific accessibility regulations for covered entities to give the Act meaning, and even delayed the ADA's effective date to allow time to promulgate them and first permit voluntary compliance. Under the Administrative Procedures Act ("APA"), adopting such regulations requires public notice and comment by interested parties. This process was duly completed for shore side facilities by DOT and DOJ within the congressionally-prescribed deadline. Those facilities knew what the specific accessibility requirements were before liability could be imposed for alleged violations.

No regulations addressing construction, alteration, barrier removal, or policies and procedures of any kind were ever adopted for cruise ships. Both DOT and DOJ, the agencies with expertise to address these matters, have consistently stated their shore side regulations do not apply to ships due to the substantial differences with facilities on land and the limitations of the marine environment. In addition to the obvious physical differences, passenger vessels must be self sufficient in providing crisis management in a marine casualty and do not have the same recourse to shore-based emergency

resources as do accommodations located on land. These vital distinctions dictate particular design and operational features and safety considerations. Nonetheless, the courts, which are ill-equipped to do so, have been faced with the daunting task of reconciling conflicting proposals of interested parties with foreign and international shipbuilding and safety mandates. The resulting dilemma is especially acute considering the continuous movement of ICCL's vessels to different foreign and domestic jurisdictions, the unique legal and physical environment in which they operate, and the Constitutional requirement for uniformity in maritime matters repeatedly emphasized by the Supreme Court.

ICCL therefore urges the Court to grant the Petition and provide much-needed guidance on whether Title III of the ADA can be applied to foreign ships under the existing scheme.

ARGUMENT

I. THE SPLIT BETWEEN THE FIFTH AND ELEVENTH CIRCUITS ON THE ADA'S APPLICATION TO FOREIGN SHIPS HAS CREATED CONFUSION OF NATIONAL AND INTERNATIONAL MAGNITUDE, WHICH THIS COURT SHOULD RESOLVE.

A. The Lack of Any Congressional Mandate for Applying the ADA Extraterritorially Has Created a Quagmire in the Cruise Industry.

A congressional mandate to apply the ADA extraterritorially is required before the Act can be interpreted to reach foreign vessels. Congress may apply U.S. law to foreign flag vessels in the U.S., but whether it chooses to exercise that power is a matter of statutory construction. *EEOC v. Arabian*

American Oil Co. ("Aramco") 499 U.S. 244, 248 (1991). For domestic laws to be applied to foreign vessels entering United States waters, "there must be present the affirmative intention of Congress clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963), quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). The *Aramco* holding affirmed the principle that laws passed by Congress are presumed not to apply beyond the territorial jurisdiction of the U.S. "unless a contrary intent appears." 499 U.S. at 248. That legislative intent must be found in "specific language" and cannot be deduced from "boilerplate language which can be found in any number of congressional acts."[2] *Id.*, 499 U.S. at 250-51. Likewise, broad references to "foreign commerce" or to commerce between "any of the States or territories and any foreign nation or nations," do not show Congress's affirmative intent to apply the law extraterritorially. *Id.*, 499 U.S. at 251.

Examining Title III of the ADA and its legislative history demonstrates that no specific language, or any language whatsoever, applies the Act extraterritorially, supporting the notion that Congress did not intend or even envision applying the Act extraterritorially at all.[3] This conclusion is further bolstered by the fact that Congress never acknowledged potential conflicts between Title III and foreign laws, or the impact of unilaterally extending U.S. accessibility standards to international maritime commerce.

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[2] The *Aramco* Court specifically referred to the ADA as an example of an Act with such "boilerplate language" that would not be sufficient to establish the requisite congressional intent. 499 U.S. at 251.

[3] Although the statute contains an exhaustive list of "public accommodations" and "specified public transportation," it does not even mention ships, let alone foreign flag ships. 42 U.S.C § 12181(7), (10). *See also* House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336 (1990), which in over 3000 pages of published legislative history makes no mention of cruise ships.

By stark contrast, Title I of the same Act, which governs employment, contains several provisions expressly addressing extraterritorial application. The very definition of "employee" includes U.S. citizens working abroad. (42 U.S.C. § 12111 (4)). Congress specifically extended Title I to "covered entities in foreign countries" (42 U.S.C. § 12112(c)), and "control of [a foreign] corporation" by an American employer (*Id.*, subsection (2)). Title I prescribes a set of statutory criteria for determining whether an American employer controls a foreign corporation for purposes of invoking the ADA (*Id.*, subsection (2)(C)). Congress even delineated Title I's outer extraterritorial reach by specifying discrimination claims do not lie for actions required by foreign law. (42 U.S.C. § 12112(c)(1)). These provisions clearly evidence Congress's intent to apply Title I to American employees working in foreign countries for companies that are controlled by American employers. In so doing, Congress enunciated its considered judgment concerning the interplay between Title I of the ADA and applicable foreign laws.

Title I proves that Congress knows how to express its intent to apply U.S. law extraterritorially. The legislature's failure to express any such intent in Title III demonstrates just as clearly that Congress did not intend the Act to apply to public accommodations beyond the U.S., such as foreign cruise ships.[4] DOT's and DOJ's failure to assert their

[4] As the court in *Aramco* noted, "Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." 499 U.S. at 258. The *Aramco* Court listed various examples of such congressional expressions, and in refusing to interpret Title VII as having extraterritorial application without clear congressional expression, concluded that "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." 499 U.S. at 259. In response, Congress amended both Title VII and *only* Title I of the ADA, providing limited foreign

regulatory power over foreign ships since the ADA was passed, even if so authorized by Congress, evidences these agencies' own understanding that there are limits to Title III's application at sea. The lack of congressional intent for any extraterritorial application, let alone to what extent, has now resulted in two conflicting circuit court decisions. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), *reh'g denied, reh'g, en banc, denied*, 284 F.3d 1187 (11th Cir. 2002) [holding Title III applies to foreign cruise ships and rejecting presumptions against extraterritorial application of U.S. law or to the internal affairs of ships], and *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650 (5th Cir. 2004) [holding Title III does not apply to foreign-flagged cruise ships "until Congress clearly expresses its intention to do so."]. The Eleventh Circuit has held international cruise lines must remove architectural barriers to comply with the ADA whenever embarking Americans in U.S. ports, yet no regulations have been promulgated to provide guidance on the type of structural changes required to achieve compliance. Operators are thus exposed to arbitrary liability on a jurisdiction-by-jurisdiction basis. In the Fifth Circuit the barrier removal provisions of the ADA do not apply to foreign ships at all.

The question of whether the ADA extends to such vessels, and if so to what degree, must be resolved by Congress. Applying Title III to a ship clearly anticipates permanent structural changes, inevitably giving Title III extraterritorial application to any foreign cruise ship that enters the U.S., however infrequently, but also travels abroad. Similarly, adoption of standards governing the degree of wheelchair accessibility, or for patrons with vision or hearing impairments, has direct impact on the procedures to be

application. Title III has not been so amended, even after the potential of international implication has been brought to Congress's attention through the *Aramco* decision.

followed in emergencies on foreign vessels in international waters. Therefore, extending Title III to ships necessarily affects their internal affairs. Under international law, the term "internal management and affairs" of the ship extends well beyond labor and employment matters, including, for example, "adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard a ship and to maintain good order thereon," and ensuring safety at sea with regard to "the construction, equipment, and seaworthiness of ships . . . the manning of ships, . . . and the training of crews . . . ." Restatement (Third) of the Foreign Relations of the United States § 502, comments a and b (emphasis added). Nothing can be more internal to a ship than its structure, layout and operation, all aspects of which are currently governed by international law.

Before imposing vague and undelineated ADA requirements on foreign cruise ships, Congress must consider the existing international maritime regime. These standards include, for example, current IMO recommendations for vessel design and operation with regard to accessibility,[5] SOLAS' technical, structural, safety and operational mandates, and the International Convention on Load Lines governing watertight integrity aboard oceangoing vessels.[6] Without statutory clarification no one can determine whether the ADA applies to foreign cruise ships at all. If so, should Title III apply to every ship embarking in the U.S., only those that do so with certain regularity, based upon the percentage of U.S.

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[5] The IMO, through the Maritime Safety Commission ("MSC"), published its "Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs" on June 24, 1996. *See* IMO's MSC Circular 735.

[6] Among the requirements of the Convention on Load Lines, 18 U.S.T. 1857, T.I.A.S. No. 6331 (1966), ratified by the United States, is the installation of watertight doors in specified compartments, necessitating the existence of raised sills and thresholds.

passengers carried, or according to some other criteria? No mechanism for resolving conflicts between U.S. and international accessibility and construction standards is included in Title III.

Most of the world's cruise ships reposition among multiple jurisdictions throughout each year, both in the U.S. and abroad. A typical ship might spend the winter months sailing the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer embarkations in Vancouver with visits to ports in Alaska. In fact, under longstanding U.S. cabotage laws, foreign ships are ineligible to engage in so-called "coastwise trade" within the United States and must travel to foreign ports as part of an international voyage. *See* Passenger Services Act, 46 U.S.C. § 289, and Jones Act, 46 U.S.C. § 883.[7] Were every foreign jurisdiction to apply its own accessibility standards to international cruise ships embarking passengers in local waters, as was done in *Stevens*, the potential for an operational dilemma is clear.[8] A number of other nations have currently proposed or enacted their own regulations establishing accessibility standards for transporting

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[7] The term "coastwise port" refers to a "port in the U.S., its territories, or possessions embraced within the coastwise laws." 19 C.F.R. § 4.80a(a)(1). The term "foreign vessel" is defined in 46 U.S.C. § 2101(12) as "a vessel of foreign registry or operated under the authority of a country except the United States."

[8] For illustration purposes, ICCL member cruise lines will embark passengers in all of the following foreign nations within the next year: Africa, Argentina, Aruba, Australia, Barbados, Brazil, Canada, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, England, France, Bahamas, Greece, Iceland, India, Italy, Japan, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Russia, Seychelles, South Africa, Spain, Sweden, Tahiti, Thailand, Turkey, United Arab Emirates, and Vietnam.

passengers with disabilities.[9] The unilateral imposition of domestic accessibility laws would destroy international uniformity and defeat the goal of national administrations to develop effective and consistent standards.[10] Certainly, Congress did not envision such a scenario. The legislature must necessarily first consider how far U.S. laws should reach along with the implication of any exercise of national power on the international maritime community.

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[9] *See* United Kingdom's, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, which is modeled after IMO's guidelines of MSC Circular 735, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada's Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http://www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia's Disability Standards for Accessible Public Transport, *available at* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B?OpenDocument>. *See also* the Disability Rights Education and Defense Fund A to Z list of all nations with laws protecting individuals with disabilities, *available at* <http://www.dredf.org/international/lawindex.html>.

[10] The international goal of achieving uniformity in maritime commerce was long ago recognized with the creation of the IMO, the purpose of which was, in part "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation," and "to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." Convention Establishing the Inter-Governmental Maritime Consultative Organization, (renamed Convention on the International Maritime Organization in 1982), 9 U.S.T. 621, T.I.A.S. No. 4044, Part I, Article 1(a)(b) (1948).

B. The Absence of Regulations Has Compounded the Confusion Caused by Congress's Failure to Address the ADA's Application to Foreign Ships.

Congress directed the DOT and DOJ to enact specific regulations establishing accessibility standards for covered entities within one year of the Act's passage. 42 U.S.C. § 12186(a)(1)(b)-(c). Such regulations have been developed for shore side facilities of almost every conceivable type, after inviting the public's comment under the APA. Yet none of those regulations mention vessels of any kind, nor any of their appurtenances or features, such as the number of accessible cabins; routes of ingress or egress (i.e., gangways, hatches or ladders); accessibility standards for life boats, tenders, passageways, raised door thresholds or shipboard lifts; or any of the numerous other structures located on ships. More important, both the DOT and DOJ have expressly acknowledged cruise ships are so different from land structures that they require special consideration, including their own set of accessibility guidelines and exemption from the shore side regulations.[11] Even if the DOT and DOJ promulgate regulations for cruise ships, the extent to which they apply to

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[11] In 1991, the DOT observed that "at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels... [The DOT] anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels." 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991). The DOT also noted that before promulgating specific requirements for foreign flag ships it would need to determine whether any treaty provisions, such as SOLAS, to which the U.S. is a signatory, might conflict with the ADA and its regulations. *Id.* At 45,600. Likewise, the DOJ declared it "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements." 28 C.F.R. PT. 36, App. B at 664.

foreign vessels would nevertheless remain entirely unclear unless Congress first amends Title III, as it has done with Title I, to specify under what criteria that application is triggered. Any regulations purporting to govern accessibility characteristics on foreign ships, without appropriate amendments to Title III, would exceed the scope of the federal agencies' authority.

Meanwhile, numerous lawsuits have been filed against ICCL members seeking injunctions under the ADA to cease cruises pending physical reconstruction of ships and/or adoption of different policies and procedures to meet nonexistent standards.[12] Most of these actions have demanded compliance with shore side "ADA Accessibility Guidelines for Buildings and Facilities" ("ADAAG"). The DOJ has intervened in many of these suits, advancing the view that Title III applies to foreign ships. Paradoxically, DOJ

[12] In addition to the *Stevens* and *Spector* decisions, *supra*, reported cases include: *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) [rejecting claims under ADA's con-struction and alteration provisions when no regulations exist]; *Resnick v. Magical Cruise Co. Ltd.*, 148 F. Supp. 2d 1298 (M.D. Fla. 2001) [no relief available under ADA's construction and barrier removal provisions in the absence of cruise line regulations]; *Access Now, Inc. V. Holland Am. Line-Westours, Inc.*, and *Costa Crociere, S.P.A.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) [denying motions to dismiss and permitting cases to proceed despite absence of applicable cruise line regulations]; *Assoc. for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) [applying Title III's barrier removal provisions to casino cruise ship]. *See also* complaints filed in the following actions: *Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233 (S.D. Fla. 2000); *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.*, No. 00-2255 (S.D. Fla. 2000); *Access Now, Inc. v. Celebrity Cruises, Inc.*, No. 00-2254 (S.D. Fla. 2000); *Access Now, Inc. v. Carnival Corp.*, No. 98-3081 (S.D. Fla. 1998); *Ernst-Rosenkrantz v. Carnival Corp.*, No. 99-0267 (S.D. Fla. 1999); *Walker v. Carnival Cruise Lines*, No. C-98-2926 (N.D. Cal. 1998); *Zetwick v. Carnival Corporation*, No. C-02-0740 (N.D. Cal. 2002). *See also, Giacopini v. Crystal Cruises, Inc.*, No. C-04-1089 (N.D. Cal. 2004) [motion to dismiss granted by Order dated June 25, 2004, adopting *Spector's* holding and rejecting *Stevens*].

simultaneously concedes ADAAG cannot be applied. The PVAAC, the very committee established by the U.S. Access Board to study passenger vessel access with the assistance of a broad spectrum of interested parties, including cruise ship owners and operators, naval architects, marine engineers, port authorities and disability advocates, has agreed that special regulations are essential. In its Final Report, the PVAAC identified numerous specific instances of direct conflict between the ADAAG and SOLAS and U.S. Coast Guard Requirements.[13] The same conclusion was incorporated by DOJ in its own ADA Title III Technical Assistance Manual, which states: "Because of the unique structure of ships, none of the ADAAG technical or scoping standards are appropriate. Until such time as the [Access Board] issues specific standards applicable to ships, there is no requirement that ships be constructed accessibly."[14]

The resulting industry-wide quagmire is not surprising, because cruise ships are vastly different from shore side buildings. At the most basic level, buildings do not move, while ships are constantly affected by six degrees of motion – pitch, roll, heave, surge, sway and yaw. Ships are carefully integrated and complex machines, containing fire safe zones, watertight and automatic fire doors, muster stations, lifeboats, stabilizers, extensive fire fighting and other safety systems, and literally countless other conditions dictating different design limitations from those existing on land. The deck capacity, weight restrictions, steel tensile strength, stability considerations, height of railings, bulkheads, walls, ceilings, and hardware are all different. Ships must float, withstand flooding, listing, or movement in seaways, combat fires in the

[13] Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, available at <http://www.access-board.gov/pvaac/commrept/index.htm>.

[14] ADA TECHNICAL ASSISTANCE MANUAL, U.S. DEP'T OF JUSTICE, § III-5.3000, illus. 3 (1993).

middle of the ocean, connect with piers around the world, navigate through canals, sail through shallow or deep waters, and move at sea without injuring passengers.

Buildings are constructed of easily moveable drywall facilitating physical alteration. Patrons can be readily evacuated to adjacent structures, surrounding property, hospitals and shelters. By contrast, ship bulkheads are constructed of solid steel to ensure watertight and fire safe integrity. Vessels and their lifeboats must function as places of safe refuge while at sea. The enormously complex design and function of modern passenger ships require extensive coordination among experts in marine architecture, engineering, operation, safety and disability accommodations, to determine precisely what accessibility standards can be applied on the oceans. This effort must also ensure any regulations do not conflict with shipbuilding standards, international treaties and conventions, and shipping classification society requirements adopted by flag states.

Notwithstanding the statutory and regulatory vacuum concerning Title III, plaintiffs prosecuting ADA accessibility lawsuits against cruise operators have asked each court to decide how ships should be rebuilt, altered or operated to accommodate special needs. The courts are simply not equipped to do so and the results have varied in each jurisdiction. Judges are forced to apply either shore side ADAAG regulations (which directly conflict with international laws), require carriers to modify their vessels or operations to meet wholly undefined and unspecified standards, or not apply the ADA at all. Courts must rely solely upon the conclusions of paid experts as to how the needs of passengers with disabilities should be reconciled with the unique requirements of oceangoing ships. Once a court fashions an order and a cruise line complies, the line has no protection from suits in other jurisdictions by new plaintiffs with different preferences and expert opinions. Such *ad hoc* adjudication inevitably

leads to conflicting results and forum shopping in an industry most in need of national and international uniformity.

If the task of deciding accessibility standards, or whether U.S. law even applies, is left to individual judges, the likelihood of inconsistent standards for each line, or even from ship to ship, is significant. Such a scenario not only creates confusion and conflicts for ship operators, but also results in guests with special needs having great difficulty determining what level of accessibility to expect in the cruise industry as a whole. Should Congress clarify under what circumstances Title III of the ADA can be applied to foreign ships, cruise lines deserve an opportunity to participate in the rule making process and voluntarily comply with specific regulations, before being subjected to conflicting injunctions for failing to implement nonexisting standards.

II. REQUIRED UNIFORMITY IN ACCESSIBILITY STANDARDS AND MARITIME LAW IS LOST WITHOUT A STATUTORY AND REGULATORY FRAMEWORK.

Congress clearly expressed its desire for a uniform nationwide application of the ADA, the purpose of which was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). To effectuate its intent, Congress required the DOT and DOJ to create uniform standards for covered entities. However, the current circuit split regarding the applicability of the ADA to foreign cruise ships, as well as the lack of regulations for any passenger vessels, undermines Congress's foundational interest for a clear, comprehensive national application of the Act.

The importance of maritime uniformity is particularly germane to cruise ships sailing throughout the world and subject to a pervasive scheme of national and international

laws, standards and treaties. The regulation of maritime commerce must be uniform and consistent on a domestic and global basis, especially on issues of shipboard design, safety, and construction involving the peculiar technology of travel by sea.

Uniformity of maritime law is a century-old doctrine with its foundation in the United States Constitution. In addition to giving Congress the power to regulate foreign and interstate commerce in the Commerce Clause, Article I, § 8, Clause 3, the Framers also provided in the Admiralty Clause, Article III, § 2, Clause 1, that the federal judicial power extends to "all cases of admiralty and maritime jurisdiction." This latter provision, though on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828).

The importance of national and international maritime uniformity is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221(1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601 (1974) *reh. denied*, 415 U.S. 986 (1974); *The Lottawanna*, 88 U.S. (21. Wall.) 558 (1874). The need for uniformity in admiralty matters is so critical that even Congress is limited in its power to authorize the states to adopt rules of law leading to state-by-state variations. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920). This Court aptly stated long ago:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on ali subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. at 574-75.

The long-established doctrine of uniformity in maritime commerce is being eroded by increasing ADA litigation in various jurisdictions, creating inconsistent rulings on Title III's application and the relevant accessibility standards for cruise ships. Divergent outcomes are plainly untenable in an industry already governed by numerous international conventions setting forth a comprehensive body of applicable standards. The current circuit split on the very issue of whether Title III even applies demonstrates the judiciary's own confusion, and frustrates the required uniform application of laws in maritime matters.

CONCLUSION

Efficient and safe operation of passenger vessels engaged in international trade is dependent upon clear, consistent standards for the accommodation of persons with disabilities. Any efforts by the United States to regulate foreign cruise ships in this arena must necessarily be deliberate, objective and coordinated, taking into account the complex practical aspects of cruise ships, their structural and technical variations from shore side facilities, and the real potential for conflicts with international standards. Leaving this task to the courts in the absence of congressional direction or regulatory guidance encourages needless litigation, creates a huge waste of judicial resources, and fosters inconsistent results. This Court should accept review not only to resolve the serious conflict in the circuit courts, but also to maintain the Constitutional mandate for maritime uniformity.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: July 2, 2004.

Respectfully submitted,

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In The

Supreme Court of the United States

DOUGLAS SPECTOR, ET AL.,
Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, AMERICAN OCCUPATIONAL THERAPY ASSOCIATION, UNITED SPINAL ASSOCIATION, GOODWILL INDUSTRIES INTERNATIONAL, INC., NATIONAL MULTIPLE SCLEROSIS SOCIETY, THE ARC OF THE UNITED STATES, AND UNITED CEREBRAL PALSY IN SUPPORT OF CERTIORARI

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July 5, 2004

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BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, AMERICAN OCCUPATIONAL THERAPY ASSOCIATION, UNITED SPINAL ASSOCIATION, GOODWILL INDUSTRIES INTERNATIONAL, INC., NATIONAL MULTIPLE SCLEROSIS SOCIETY, THE ARC OF THE UNITED STATES, AND UNITED CEREBRAL PALSY IN SUPPORT OF CERTIORARI

The Paralyzed Veterans of America ("PVA"), the American Occupational Therapy Association ("AOTA"), the United Spinal Association, Goodwill Industries International, Inc. ("Goodwill"), the National Multiple Sclerosis Society, The Arc of the United States ("The Arc"), and United Cerebral Palsy ("UCP") respectfully submit this *amici curiae* brief in support of certiorari.[1]

INTEREST OF *AMICI*

Founded in 1946, the Paralyzed Veterans of America is a congressionally chartered veterans service organization with over 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its members and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of our members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq*. PVA's Advo-

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[1] The parties in this case have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

cacy and Architecture Programs advocate for full access to the built environment, including marine vessels of all types. PVA receives complaints from its members and others who suffer discrimination because they cannot gain access to cruise ships or because they do not have access to the full range of services and amenities available to others onboard.

The American Occupational Therapy Association is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, wellbeing, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of positive public policy such as that contained in the ADA and disability income support programs.

The United Spinal Association is a membership organization of persons with spinal cord dysfunction, injury, or disease, many of whom are persons with disabilities as defined by the ADA. The United Spinal Association furthers its members' interests by assuring quality healthcare, promoting research, advocating for civil rights and independence, and educating the public about these issues and enlisting their help to achieve these fundamental goals. The United Spinal Association has expanded its original mission of advocacy as a veterans' organization and now provides its expertise to all individuals with a spinal cord injury or disease, regardless of their age, gender, or veteran status. The United Spinal Association has direct experience with travel services available to individuals with mobility impairments. Particularly, the United Spinal Association advocates on behalf of travelers with disabilities who have confronted barriers during their

trips and is just beginning to offer travel services to its members.

Goodwill Industries International, Inc. is a network of community-based, autonomous member organizations serving people with workplace disadvantages and disabilities by providing job training and employment services, as well as job placement opportunities and post-employment support. With locations in the United States, Canada, and twenty-three other countries, Goodwill helps people overcome barriers to employment and become independent, tax-paying members of their communities. Through its membership network, it seeks to enhance the quality and dignity of life for individuals, families, and communities on a global basis, through the power of work, by eliminating barriers to opportunity for people with special needs, and by facilitating empowerment, self-help, and service through dedicated, autonomous local organizations. Goodwill weeks to ensure that every person in the global community has the opportunity to achieve his or her fullest potential as an individual and to participate and contribute fully in all aspects of a productive life.

The National Multiple Sclerosis Society is a not-for-profit organization serving people with multiple sclerosis ("MS") in every state. Founded in 1946, the Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through a nationwide network of chapters, the National MS Society supports research efforts, educates, provides a variety of empowering programs, organizes fund-raising events, and advocates for people with disabilities.

The Arc of the United States, through its approximately 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related developmental disabilities and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false

stereotypes, that have authorized or encouraged segregation of people with mental retardation and related disabilities in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the ADA. The Arc is now actively involved in the law's implementation and enforcement.

For more than 55 years, United Cerebral Palsy has been committed to change and progress for persons with disabilities. The national organization and its nationwide network of 99 affiliates in 36 states, and the District of Columbia, strive to ensure the inclusion of persons with disabilities in every facet of society — from the Web to the workplace, from the classroom to the community. As one of the largest health charities in America, UCP's mission is to advance the independence, productivity, and full citizenship of people with disabilities through an affiliate network.

SUMMARY OF ARGUMENT

Amici file this brief in support of certiorari in this case because of the important question it presents regarding the applicability of the ADA to cruise ships. For many people with disabilities, taking a cruise is an ideal vacation option because cruise ships offer, in a relatively small space, an incredible array of leisure activities. Cruise ships frequently contain restaurants, bars, movie theaters, shopping outlets, casinos, sunbathing decks, swimming pools, live music and theater, educational programs, health spas, and gymnasiums. Thus a traveler with a disability, who may have limited mobility, need not leave the ship to enjoy a host of entertainment options. She need only unpack once over the course of her vacation, and if she requires rest in the middle of the day, her cabin is close at hand. A recent survey commissioned by the Travel Industry Association of America and two other groups found that people with disabilities are fifty percent more

likely to have taken a cruise in the past five years than the population at large.

The decision of the Court of Appeals in this case, however, if left to stand, would give cruise lines license to ignore accessibility requirements mandated by the ADA. When Congress passed the ADA, it deliberately crafted the public accommodations provisions to reach broadly and to cover entities like cruise ships. Congress did not only seek to guarantee access to the bare necessities of life like grocery stores and hospitals; rather, Congress decided to include cultural outlets that make life more fulfilling, such as theaters, museums, health spas, and amusement parks. Allowing cruise ships to avoid the public accommodations provisions of the ADA would subvert Congress' stated goal of permitting people with disabilities to participate fully in society. Moreover, there is no principled reason for exempting cruise ships from the ADA. Given the demonstrated feasibility of making cruise ships accessible, and in light of the fact that many cruise lines have made their ships accessible and actively recruit passengers with disabilities, any concern about asking the industry to do the impossible is misplaced. This Court should therefore grant the writ, set the case down for briefing and argument, and reverse the judgment below.

ARGUMENT

I. EXEMPTING CRUISE SHIPS FROM TITLE III OF THE ADA WOULD SUBVERT CONGRESS' GOAL OF FULL PARTICIPATION IN SOCIETY BY PEOPLE WITH DISABILITIES.

A. The Plain Text of the ADA and Its Legislative History Evidence Congress' Goal of "Full Participation."

When it passed the ADA in 1990, Congress recognized "the continuing existence of unfair and unnecessary

discrimination" against people with disabilities. 42 U.S.C. § 12101(a)(9). Congress sought to remedy this invidious discrimination through the public accommodations provisions of Title III, which was designed to assure "full participation" by people with disabilities in American society. *Id.* § 12101(a)(8). As the House Committee on Public Works and Transportation noted in its final report, "[t]he [ADA] will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities *fully* into the mainstream of American society." H.R. Rep. No. 101-485(I) (1990), at 24 (emphasis added); *see also* H.R. Rep. No. 101-485(III), at 22 ("The purpose of the [ADA] is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.").

To achieve this goal of full participation, Congress made the public accommodations provisions of the ADA broad in scope; the sweep of ADA coverage reaches more entities and services than any of Congress' earlier civil rights statutes.[2] Notably, the Act does not limit its coverage to only those businesses and services that a person with a disability would need in order to meet the day-to-day requirements of contemporary life. Rather, the provisions cover almost all aspects of public life and human interactivity. In addition to requiring accessibility for more basic needs (e.g., grocery

[2] *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 385-87 (2001) (comparing scope of Title III to the narrower public accommodations provisions of the Civil Rights Act of 1964); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 470-73, 493-501 (1991) (noting that Title III covers, "with a few exceptions such as the sale or rental of housing, almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public").

stores and hospitals), Title III expressly includes concert halls, galleries, museums, health spas, amusement parks, or any "other place of recreation" in order to ensure that people with disabilities have access to cultural outlets that make life joyous, not just possible. *See* 42 U.S.C. § 12181(7). That Congress opted to explicitly include these signifiers of a fully-lived life is unsurprising in light of its finding that "persons with disabilities . . . have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life." H.R. Rep. No. 101-485(III), at 25 (citing Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream* (1986)). Thus in passing the ADA, Congress sought to help people with disabilities realize one of their greatest dreams — to live an unconstrained life that includes everything society has to offer.[3]

B. "Full Participation" Includes Equality of Access on Cruise Ships

Cruise ships have long held a special place in the American cultural psyche, and their rich history has been well documented and fictionalized in print, film, and television.

[3] As testimony before Congress repeatedly emphasized, attainment of the "American dream" for people with disabilities was a primary goal of the ADA. *See, e.g.*, S. Rep. No. 101-116, at 20 (1989) (citing testimony that the ADA would permit people with disabilities to "have the same aspirations and dreams as other American citizens" and "know that their dreams can be fulfilled," and that America is true to its ideal of equality, which is "the full measure of the American dream"); *id.* at 96 (additional views of Sen. Hatch) ("Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream. It is time for that dream to become a reality."); 136 Cong. Rec. S9684 (July 13, 1990) (statement of Sen. McCain) ("Mr. President, this bill is an important step in making the American dream available to all . . . . The freedom to pursue the American dream is at the heart of what makes our Nation great.").

See, e.g., Kurt Ulrich, MONARCHS OF THE SEA (1999, St. Martin's Press); TITANIC (Paramount Studios, 1997); Frederick Emmons, AMERICAN PASSENGER SHIPS: THE OCEAN LINES AND LINERS, 1873-1983 (1985, Univ. of Del. Press); THE LOVE BOAT (1977-1986, ABC Television). As the recent media coverage of the maiden voyage of the *Queen Mary 2* attests, cruise ships continue to operate as a cultural signifier of the good life. *See* Melissa Grace, Ralph Ortega, and Jose Martinez, *Bow to the Queen: New Yorkers Stand at Attention as QM2 Ends 1st Voyage Here*, N.Y. DAILY NEWS, Apr. 23, 2004, at 2; James Barron, *A Queen Arrives, and Even in Jaded New York, Jaws Drop*, N.Y. TIMES, Apr. 23, 2004, at B2. Statistics bear this out: A recent study sponsored by the cruise industry found that 68 million Americans — almost one-quarter of the country's population — have indicated a desire to take a cruise. *See* International Council of Cruise Lines ("ICCL"), *Cruise Industry FAQs*, *available at* http://www.iccl.org/faq/cruising.cfm (last visited on June 25, 2004) (describing a cruise as "everyone's dream vacation").

The continued public appeal of cruise ships has fueled unparalleled growth in the industry. Tens of millions of people have taken a cruise in the past two decades, *id.*, and despite a general economic downturn in the rest of the tourist industry post–9-11, the cruise industry has "continued its record growth," it has "maintain[ed] its historically high occupancy rate," and it "continue[s] to expand its contribution to economic activity in the United States." ICCL, *2002 Economic Summary*, *available at* http://www.iccl.org/resources/2002EconomicStudySummary.pdf (last visited on June 25, 2004). It is not difficult to locate the source of the cruise industry's popular success. Besides occupying a unique place in our collective consciousness, "a cruise offers all the things most people want in a vacation — romance, excitement, relaxation, adventure, escape, discovery, luxury, value and more." ICCL, *Cruise Industry FAQs*, *supra*.

It is practically stating the obvious to note that "full participation" in society includes the ability to enjoy these celebrated aspects of human existence. Philosophers have observed for centuries that "being able to laugh, to play, to enjoy recreational activities" are central to the attainment of a fully-lived life. Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 222 (1992).[4] As noted above, Congress recognized just how important these activities are when it included leisure-focused entities such as health spas, museums, and amusement parks in the list of public accommodations covered by Title III. *See* 42 U.S.C. § 12181(7). As the Eleventh Circuit observed in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), cruise ships are essentially floating public leisure and recreation centers. "Cruise ships, in fact, often contain places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift ships [sic], gymnasiums, and health spas." *Id.* at 1241. Therefore, to exempt cruise ships from the requirements of Title III, especially in light of the remarkable position they occupy in American culture, is to seriously undermine Congress' goal of full participation by people with disabilities in all aspects of American life. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (explaining that Title III "should be construed liberally" to further congressionally mandated goals, and finding that a professional golf competition is therefore a "public accommodation" under the ADA).[5]

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[4] *Quoted in* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1015 (2004).

[5] As Petitioners explain on page 13 of their Petition for a Writ of Certiorari, no cruise ships serving United States mainland ports currently fly the American flag. Thus, while this case technically concerns only application of Title III to foreign-flagged cruise ships, the practical effect of any ruling of this Court will be to determine whether *any* cruise ship must comply with the mandate of Title III.

II. COMPLIANCE WITH TITLE III OF THE ADA WOULD NOT ADVERSELY AFFECT THE CRUISE SHIP INDUSTRY.

A. The Final Report of the Passenger Vessel Access Advisory Committee Provides Workable Standards for the Cruise Ship Industry's Compliance with Title III.

The ADA mandates that the Architectural and Transportation Barriers Compliance Board ("Access Board") play an active role in making sure that public accommodations are "accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. § 12204. In furtherance of this mandate, the Access Board is required to issue minimum guidelines and requirements for accessibility, which federal agencies are then required to incorporate into any final enforcement regulations issued pursuant to section 306 of the ADA. *See* 42 U.S.C. § 12186(c).

In August 1998, the Access Board created the Passenger Vessel Access Advisory Committee ("PVAAC") to provide recommendations for a proposed rule addressing accessibility guidelines for newly constructed and altered passenger vessels and cruise ships covered by the ADA. The PVAAC was composed of twenty-one members representing various groups, including owners and operators of passenger vessels and cruise lines, designers of passenger vessels, and organizations representing individuals with disabilities.[6] The

[6] The Committee's membership included American Classic Voyages, American Council of the Blind, American Sail Training Association, American Society of Travel Agents, BB Riverboats, Boston Commission for Persons with Disabilities, Chesapeake Region Accessible Boating, International Council of Cruise Lines, National Tour Association, Paralyzed Veterans of America, Passenger Vessel Association, Port of San Francisco, Princess Cruises,

PVAAC explored various ways in which to achieve access in light of competing considerations, and it made recommendations (in the form of a Final Report) that the Access Board will use in proposing guidelines. *See* Summary of the Report from the Passenger Vessel Access Advisory Committee, *available at* http://www.access-board.gov/pvaac/commrept/report-summary.htm (last visited June 28, 2004).

Amicus PVA representatives were active members of the PVAAC and worked collaboratively with other Committee members (including industry representatives) to provide recommendations to the Access Board regarding how newly constructed and altered passenger vessels would comply with the ADA. In developing its Final Report, the PVAAC applied the existing ADA Accessibility Guidelines for Buildings and Facilities to passenger vessels and then modified certain "building" provisions which the Committee determined would be problematic if applied to seagoing vessels.[7] Vessel owners and operators understood that the applicability of the

Rhode Island Tourism Division, Self Help for Hard of Hearing People, Society for the Advancement of Travel for the Handicapped, Society of Naval Architects and Marine Engineers, Southeast Alaska Independent Living, Southwest Disability and Business Technical Assistance Center, Transportation Institute, and the Washington State Department of Transportation. *See Passenger Vessel Access Advisory Committee Members*, *available at* http://www.access-board.gov/pvaac/CommList.htm.

[7] The Final Report is available online at http://www.access-board.gov/pvaac/commrept/index.htm. While PVAAC issued its Final Report over three years ago, the Access Board has yet to issue formal guidelines based on the Final Report, and the Department of Justice and Department of Transportation have yet to promulgate any regulations based on the Report. *See Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650 n.10 (5th Cir. 2004) ("Amazingly, now more than a decade since the ADA's passage, DOJ and DOT have yet to issue new construction and alteration regulations specific to cruise ships.").

ADA would require at least some degree of accessibility onboard passenger vessels, as well as embarking and disembarking. The Final Report provided a sound basis for workable and appropriate standards for the cruise ship industry to implement the public accommodations provisions of the ADA.

B. Making Cruise Ships Fully Accessible to People with Disabilities Makes Good Business Sense.

In 2003, the Travel Industry Association of America, the Open Door Organization, and the Society for Accessible Travel and Hospitality released the results of a Harris Interactive Survey that examined the vacation habits of people with disabilities. The Survey found that 12 percent of the disabled population had taken a vacation cruise in the preceding five years, compared to 8 percent of the population at large.[8] The Harris Survey also found that people with disabilities spend over $13 billion each year on vacations, and that this market will only expand in the future.[9] According to the Travel Industry Association, aging baby-boomers will drive the total disabled population up to 24 percent of the U.S. population by the year 2030.[10]

Many cruise lines have recognized the market potential of people with disabilities, and have actively sought them out. Carnival Cruise Lines, for example, has produced a brochure for people with disabilities entitled "Easy Access to Fun" specifically aimed at the traveler with a disability, and

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[8] *See* Deborah Alexander, *Vacationing with Disabilities: New Travel Market Is Opening Up on the Road*, OMAHA WORLD-HERALD, May 23, 2003, at 1D; *see also A League of Their Own*, EXCEPTIONAL PARENT, Vol. 34, No. 5, May 1, 2004, at 42.

[9] *See* Alexander, *supra* note 8.

[10] *See* Tricia Holly, *Able Bodies, Open Minds: Learning to Serve the Disabled Travel Market Is Daunting but Well Worth the Effort of Travel Agents*, TRAVEL AGENT, Vol. 311, No. 2, Jan. 13, 2003, at 20.

the cruise line has experienced remarkable growth in that segment of the market.[11] When the Royal Caribbean cruise line launched its newest ship *Mariner of the Seas* in 2003, the line chose Jean Driscoll, an Olympic wheelchair champion and advocate for people with disabilities, to be the ship's "Godmother" in order to highlight the ship's accessibility. At the *Mariner*'s official launch, Driscoll christened the ship, pushing a remote-control button to release a bottle of champagne against the hull.[12]

Despite these efforts by some cruise lines to tap into the market of people with disabilities, many cruise lines have failed to make their ships fully accessible, as the instant litigation attests. While most cruise lines have in place some sort of policies or procedures regarding passengers with disabilities, these policies and procedures normally do not create any judicially enforceable rights. Many people with disabilities still face access challenges aboard cruise ships, and several suits under the ADA have been brought against the cruise lines over the past few years to try to make cruise ships more accessible. *See* Curtis D. Edmonds, *Won't You Let Me Take You on a Sea Cruise: The Americans With Disabilities Act and Cruise Ships*, 28 TUL. MAR. L.J. 271 (2004) (summarizing cases and describing policies of different cruise lines).[13]

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[11] *See id.* (noting that "the number of disabled passengers shot up 36 percent between 2000 and 2001" and "predict[ing] an even larger increase in 2002").

[12] Victoria Stevens, *Royal Treatment: Royal Caribbean Line Launches Its Newest Luxury Ship, the Mariner of the Seas*, TORONTO STAR, Nov. 27, 2003, at H01.

[13] The district and circuit courts that have considered the issue have come to varying conclusions regarding the applicability of Title III of the ADA to cruise ships. As Petitioners explain on pages 12-15 of their petition, the only two circuits to have addressed the question have come to opposite conclusions, and those two circuits account for almost two-thirds of all the cruise ship ac-

Since the PVAAC has determined that it is feasible for cruise ships to become reasonably accessible to persons with disabilities, and since many cruise lines find the market of people with disabilities a profitable one, there is no reason to exempt cruise ships from the requirements of Title III of the ADA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 5, 2004

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tivity in the country. This Court should therefore take this opportunity to settle the law in this area.

Supreme Court, U.S.
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

No. 03-1388

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 1, 2004
PETITION FOR CERTIORARI GRANTED SEPTEMBER 28, 2004

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U.S. Court of Appeals for the Fifth Circuit

CIVIL DOCKET FOR
02-21154 Spector, et al v. Norwegian Cruise

DOUGLAS SPECTOR; ANA SPECTOR; JULIA HOLLENBECK, Individually, and on behalf of all similarly situated persons; DAVID T KILLOUGH, Individually and on behalf of all similarly situated persons; RODGER PETERS, Individually and on behalf of all similarly situated persons

Plaintiffs - Appellants

v.

NORWEGIAN CRUISE LINE LIMITED, doing business as Norwegian Cruise Line

Defendant - Appellee

Case No. 03-20056

DOUGLAS SPECTOR; ANA SPECTOR; JULIA HOLLENBECK, individually, and on behalf of all similarly situated persons; DAVID T KILLOUGH, Individually and on Behalf of All Similarly Situated Persons; RODGER PETERS, Individually and on Behalf of All Similarly Situated Persons

Plaintiffs - Appellees

v.

NORWEGIAN CRUISE LINE LTD, doing business as Norwegian Cruise Line

Defendant - Appellant

10/22/02	Civil rights case docketed. NOA filed by Appellant Douglas Spector, Appellant Ana Spector, Appellant Julia Hollenbeck, Appellant David T Killough, Appellant Rodger Peters. [02-21154] (cmb) [02-21154]

2/3/03	CLERK Order filed granting joint motion to consolidate case [4095742-1] in 02-21154, granting joint motion to consolidate case [4095764-1] in 03-20056 Copies to all counsel. [02-21154, 03-20056] (jtr) [02-21154 03-20056]
6/2/03	Amicus curiae brief filed by Amicus Curiae USA in 02-21154, Amicus Curiae USA in 03-20056, Amicus Curiae USA in 03-20056. Consent included in brief? [Y/NA] NA Copies of Brief: 6 # of pages: 27 Word count: 6,909 Date of COS: 4/3/03 Disk Provided [Y/N]: y Sufficient [Y/N]: n NEEDS 1 ADDITIONAL COPY. [4209879-1] [02-21154, 03-20056] Sufficient Brief due on 6/16/03 for USA in 02-21154, for USA in 03-20056. (ddv) [02-21154 03-20056]
1/12/04	Opinion filed. Issd in T form? Y Mandate pull date is 2/2/04 in 02-21154, in 03-20056. [02-21154, 03-20056] (rmf) [02-21154 03-20056]
1/12/04	Judgment entered and filed. [02-21154] (rmf) [02-21154]
1/12/04	Judgment entered and filed. [03-20056] (rmf)
1/26/04	Petition filed by Appellant Doug Spector in 02-21154, Appellant Ana Spector in 02-21154, Appellant Julia Hollenbeck in 02-21154, Appellant David T Killough in 02-21154, Appellant Rodger Peters in 02-21154, Appellee Douglas Spector in 03-20056, Appellee Ana Spector in 03-20056, Appellee

	Julia Hollenbeck in 03-20056, Appellee David T Killough in 03-20056, Appellee Rodger Peters in 03-20056 for rehearing en banc. # of copies filed: 20 [4731185-1] Mandate pull date canceled. Date of COS: 1/23/04 Sufficient [Y/N]: Y [02-21154, 03-20056] (jtr) [02-21154 03-20056]
2/10/04	COURT Order filed denying petition for rehearing en banc [4731185-1] With poll (Y/N)?: N Mandate pull date is 2/17/04 in 02-21154, in 03-20056. Copies to all counsel. [02-21154, 03-20056] (rjd) [02-21154 03-20056]
2/18/04	Mandate issued. Approved BOC Issued (Y/N)?: y [02-21154, 03-20056] Mandate pull date satisfied. (jca) [02-21154 03-20056]
4/13/04	Supreme Court notice that petition for certiorari was filed on 04/01/04 by Appellant Doug Spector in 02-21154, Appellant Ana Spector in 02-21154, Appellant Julia Hollenbeck in 02-21154, Appellant David T Killough in 02-21154, Appellant Rodger Peters in 02-21154, Appellee Douglas Spector in 03-20056, Appellee Ana Spector in 03-20056, Appellee Julia Hollenbeck in 03-20056, Appellee David T Killough in 03-20056, Appellee Rodger Peters in 03-20056. Supct No.: 03-1388 [02-21154, 03-20056] (lgl) [02-21154 03-20056]

U.S. District Court for the Northern District of Texas
CIVIL ACTION NO. H-00-2649
Spector et al. v. Norwegian Cruise Line Ltd.

08/01/2000	1	COMPLAINT by Douglas Spector, Ana Spector, Julia Hollenbeck filed; FILING FEE $ 150.00 RECEIPT # 502560 (psmith) (Entered: 08/03/2000)
09/05/2000	4	FIRST AMENDED COMPLAINT by Pltfs Douglas Spector, Ana Spector and Julia Hollenbeck ,(Answer due 9/15/00 for Norwegian Cruise) amending [1-1] complaint; no new ptys added, filed. (fmremp) (Entered: 09/06/2000)
11/06/2000	5	Deft's MOTION to stay Discovery, Initial Disclosures, the Entry of a Scheduling Order, and Consideration of Class Certification Issues by Norwegian Cruise, Motion Docket Date 11/26/00 [5-1] motion , filed. (fmremp) (Entered: 11/07/2000)
11/06/2000	6	MOTION to dismiss by Deft Norwegian Cruise, Motion Docket Date 11/26/00 [6-1] motion , filed. (fmremp) (Entered: 11/07/2000)
11/21/2000	9	INITIAL RESPONSE by Pltfs Douglas Spector, Ana Spector, David T Killough, Rodger Peters and Julia Hollenbeck to [5-1] Motion to Stay, filed (fmremp) (Entered: 11/21/2000)

11/22/2000 to	11	ORDER granting Deft's [5-1] motion stay Discovery, Initial Disclosures, the Entry of a Scheduling Order, and Consideration of Class Certification Issues terminated deadlines , entered; Parties notified. (signed by Judge John D. Rainey) (fmremp) (Entered: 11/24/2000)
12/04/2000	13	MEMORANDUM OF LAW As Amicus Curiae in Support of Pltf's Opposition to Deft Norwegian Cruise Line's Motion to Dismiss by USA, filed. (fmremp) (Entered: 12/05/2000)
12/04/2000	14	RESPONSE by Douglas Spector, Ana Spector, Julia Hollenbeck, David T Killough, Rodger Peters to [6-1] motion to dismiss filed. (fmremp) (Entered: 12/05/2000)
01/09/2001	19	REPLY by Deft Norwegian Cruise Line's Pltfs' Response to the [6-1] motion to dismiss and to The United States' Memorandum of Law as Amicus Curiae in support of Pltfs' Response, filed (placed in brown expandable folder) (fmremp) (Entered: 01/10/2001)
09/09/2002	32	ORDER denying [29-1] motion for referral to Magistrate Johnson; granting [27-1] motion to extend time to respond to pltfs motion to lift the stay of discovery; granting [26-1] motion to lift stay; the Court VACATES its Order staying discovery; in a Memorandum

		and Order signed this date, the Court denied the dft's motion to dismiss , entered; Parties notified. (signed Judge John D. Rainey) (lmunoz) (Entered: 09/10/2002)
09/09/2002	33	MEMORANDUM AND ORDER granting in part, denying in part dft's [6-1] motion to dismiss; the Court dismisses the plfts' claims seeking removal of physical barriers on NCL's cruise ships; the Court DENIES NCL's motion to dismiss the plfts' remaining claims , entered. Parties notified. (signed Judge John D. Rainey) (lmunoz) (Entered: 09/10/2002)
09/19/2002	34	ANSWER by Norwegian Cruise to pltfs' first amended original complaint, filed. (kprice) (Entered: 09/20/2002)
10/08/2002	36	NOTICE OF APPEAL of [33-1] order by Douglas Spector, Ana Spector, Julia Hollenbeck, David T Killough, Rodger Peters , filed. Fee Status: Pd Receipt #: 525072 (bdaniel) (Entered: 10/11/2002)
01/21/2003	45	ORDER OF USCA (certified copy) Jan 15,2003 GRANTING leave to appeal from the interlocutory order of the United States District Court, entered on Nov 26, 2002, Re: [36-1] appeal , filed. CCA No. 02-48 (bdaniel) (Entered: 01/24/2003)

02/20/2004	48	JUDGMENT OF USCA (certified copy) Feb 12, 2004 issued as mandate on Feb 18, 2004 REMANDING and AFFIRMING in Part and REVERSING in Part, the Judgment of the District Court Re: [36-1] appeal , filed. CCA No. 02-21154 (bdaniel) (Entered: 02/20/2004)
03/19/2004	52	FINAL JUDGMENT: In accordance with the Judgment of the US Court of Appeals for the Fifth Circuit, this Court ORDERS that the Plaintiff's claims and causes of action are DISMISSED with Prejudice, entered. Parties ntfd. (signed by Judge John D. Rainey) (kwallace) (Entered: 03/19/2004)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS SPECTOR, ANA	§	
SPECTOR, JULIA	§	
HOLLENBECK, DAVID T.	§	
KILLOUGH and RODGER	§	
PETERS, Individually and on	§	CIVIL ACTION
Behalf of All Similarly	§	No. H-00-2649
Situated Persons	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
NORWEGIAN CRUISE LINE	§	
LIMITED d/b/a NORWEGIAN	§	
CRUISE LINE	§	
Defendant.	§	

PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

Plaintiffs file this First Amended Original Complaint and would respectfully show the following:

I. STATEMENT OF THE CLAIM

1. The Plaintiffs, individually and on behalf of all similarly situated persons, file this class action lawsuit against Defendant, Norwegian Cruise Line d/b/a Norwegian Cruise Line ("NCL"), for injunctive and declaratory relief pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181, *et. seq.* ("ADA").

2. Plaintiffs, individually, and as representatives of all persons who are similarly situated, also seek recovery of

attorneys fees, costs and expenses necessarily expended in this action from the Defendant.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and § 1343 to address Plaintiffs' ADA claims arising under 42 U.S.C. § 12181, *et. seq.* See also, 42 U.S.C. § 12188(a)(1)-(a)(2).

4. Venue is proper in the Southern District of Texas pursuant to 28 U.S.C. § 1391(b) and (c).

III. PARTIES

5. Plaintiffs, Douglas Spector, Ana Spector, Julia Hollenbeck, David T. Killough and Rodger Peters are all residents of Houston, Harris County, Texas and are *sui juris*.

6. Plaintiffs, Douglas Spector, Julia Hollenbeck, and Rodger Peters and other individuals who are similarly situated, are individuals with a physical impairments that substantially interfere with one or more of their major life activities, including walking. At all materials times, the Plaintiffs were qualified to participate in and receive the benefits of NCL's programs, services and activities. Thus, they are protected under 42 U.S.C. § 12181, *et. seq.*

7. Douglas Spector has a physical disability that requires him to utilize an electric scooter for mobility.

8. Julia Hollenbeck and Rodger Peters have physical disabilities that require them to utilize wheel chairs for mobility.

9. Ana Spector and David T. Killough are known to associate with persons with disabilities, and upon information and belief, Defendant NCL also discriminated against Ana Spector and David T. Killough due to their known association with persons with disabilities. Ana Spector and David T. Killough are both entitled to protection from discrimination based on their known association with persons with disabilities under 42 U.S.C. § 12182 (b)(1)(E).

10. NCL is believed to be incorporated under the law of the Bahamas. NCL's principal place of business at 7665 Corporate Center Drive, Miami, Florida 33126. Although NCL routinely conducts business in Houston, Harris County, Texas, it does not maintain a registered agent for service of process. Therefore, NCL will be served through the Secretary of State's office.

11. NCL is the owner, operator, lessor and/or lessee of the vessels and improvements made the basis for this action, namely the M/S Norwegian Sea ("Norwegian Sea") and the M/S Norwegian Star ("Norwegian Star"), which sailed regularly to and from the Port of Houston at times material to this suit. The Norwegian Sea and the Norwegian Star are places of public accommodation and they also house numerous places of public accommodation. Thus, NCL, the Norwegian Sea, and the Norwegian Star are all public accommodations under the ADA and cannot discriminate on the basis of disability or on the basis of a person's known association with persons with disabilities. See 42 U.S.C. 12182(a); 42 U.S.C. § 12181(7); 28 C.F.R. Pt. 36, App. B at 585; Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (Add. 5); and 42 U.S.C. § 12182 (b)(1)(E).

12. The Norwegian Sea and the Norwegian Star are also specified public transportation services provided by a private entity that are engaged in the business of transporting people and whose operations affect commerce as defined under 42 U.S.C. § 12184(a). Thus, NCL is prohibited from discriminating against persons with disabilities such as Plaintiffs, Douglas Spector, Julia Hollenbeck, and Rodger Peters and the class of similarly situated individuals which they represent.

IV. BACKGROUND FACTS

13. At times material to this suit, the Norwegian Star routinely departed from and returned to the Port of Houston depositing and embarking with passengers. Since the Norwegian Star sailed within the waters of the United States

at times material to this suit, it is subject to the requirements of the ADA. See *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000).

14. Although the Norwegian Star has approximately 800 cabins, it has approximately 4 cabins that are considered to be accessible to passengers who utilize wheel chairs or scooters for mobility. Passengers who must utilize "accessible cabins" are subjected to illegal surcharges for these accessible accommodations.

15. The Norwegian Sea routinely departs from and returns to the Port of Houston depositing and embarking with passengers on a weekly basis. Thus, the Norwegian Sea sails within the waters of the United States and is subject to the requirements of the ADA. See *Stevens v. Premier Cruises*, Inc., 215 F.3d 1237 (11th Cir. 2000).

16. Although the Norwegian Sea can transport approximately 1500-1800 passengers, it only has approximately 4 cabins that are considered to be accessible to passengers who utilize wheel chairs or scooters for mobility. Passengers who must utilize "accessible cabins" are subjected to illegal surcharges for these accessible accommodations.

17. Upon information and belief, NCL did not and has not taken steps to remove architectural barriers in its existing facilities or to offer goods and services in alternative settings even when it has been readily achievable to do so. Therefore, services, programs or benefits of these public accommodations were not available to the Plaintiffs during their September 1998, August, 1999, and September 1999 cruises and the Plaintiffs were denied full and equal benefit of the Defendant's programs, services and facilities, unless they paid additional illegal surcharges to get assistance and/or modifications from crew members.

18. Because Ana Spector and David T. Killough were traveling with persons who utilized a scooter and/or wheel chair for mobility, they were also denied access to NCL programs, services and facilities because of this association.

Like other class members who travel with spouses, friends and loved ones with mobility impairments, they were often forced to either miss programs, services and activities or leave their companions alone because they could not access the facilities and programs in motorized scooters or wheelchairs. These difficult and discriminatory choices would not have been necessary if NCL had been willing to modify its policies and procedures to insure equal access and enjoyment of the facilities to all class members in the most integrated setting possible. Upon information and belief, other class members have suffered and continue to suffer disc imination at the hands of NCL on the basis of their known association with persons with disabilities.

19. Furthermore, Douglas Spector, Julia Hollenbeck and Rodger Peters were subjected to different criteria and eligibility requirements that tend to screen out or discriminate against persons with disabilities and deny them equal benefit and enjoyment of Defendant's facilities because they utilize wheel chairs and/or motorized scooters for mobility. For example, NCL maintains evacuation equipment and programs in locations that are not accessible to persons who utilize scooters and/or wheelchairs for mobility or would not be accessible to persons who utilize scooters and wheel chairs in case of an emergency. Upon information and belief, other members of the class continue to suffer due to NCL's discriminatory practices, procedures and eligibility criteria.

20. Contrary to what the Plaintiffs were told prior to boarding the NCL public accommodations, NCL programs, services and activities were not open and equally accessible to persons with mobility impairments who utilize a wheel chair or scooter for mobility. Unbelievably, when high ranking NCL agents were confronted with passenger complaints of discriminatory treatment and proof that the ADA applied to cruise ships, NCL showed no remorse or willingness to change their discriminatory policies and procedures, or to make modifications to policies and procedures, or to remove readily achievable barriers in the future.

21. As a result of NCL's blatantly discriminatory treatment toward the Plaintiffs, and NCL's unwillingness to comply with the ADA, the named Plaintiffs were forced to retain an attorney to insure that no other individuals with disabilities and their loved ones are required to endure the severe embarrassment, emotional distress and discriminatory treatment that they endured.

V. CLASS ACTION ALLEGATIONS

22. Plaintiffs adopt by reference Paragraph 1 through 21 as though fully set forth herein.

21. Douglas Spector, Julia Hollenbeck, and Rodger Peters bring this class action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and all current and former passengers of NCL cruises who are similarly situated, i.e., those current and former passengers with mobility impairments who utilize wheel chairs and/or scooters for mobility. Plaintiffs Ana Spector and David T. Killough also bring this class action pursuant to Federal Rule of Civil Procedure 23 for themselves and on behalf of all similarly situated persons, i.e., current and former NCL passengers who are/were denied full and equal access to all NCL services or who were discriminated against because of their known association with persons who utilize wheel chairs or scooters for mobility. To that end, the named Plaintiffs allege the following:

(a)The named Plaintiffs state that they will fairly and adequately protect the interests of the members of the class that they represent as there is no antagonism of interest between the named Plaintiffs and the conduct that is alleged on behalf of the classes as a whole. Furthermore, the named Plaintiffs have retained counsel competent and experienced in class action and complex litigation.

(b)The named Plaintiffs state that joinder of all class members is impracticable. Proceeding as a class action is a more expeditious method in this matter because the potential members of the class are so numerous.

(c)Moreover, the claims of the named Plaintiffs are typical of the claims of the members of the classes since the named Plaintiffs and class members sustained damages arising out of the same type of discriminatory conduct.

(d)NCL's conduct constitutes a pattern or practice in violation of the ADA, which is common to all members of the classes. Thus, injunctive and declaratory relief is particularly appropriate in this case.

(e)Finally, the named Plaintiffs know of no difficulty that will be encountered in the management of this litigation, which would preclude maintenance of their claims as class actions.

VI. VIOLATIONS TITLE III OF THE ADA

24. Plaintiffs re-allege Paragraphs 1 through 23 as though fully set forth herein.

25. As previously noted, Plaintiffs base their claim on Title III of the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12181, *et. seq.* and its implementing regulations.

26. The Plaintiffs herein are individuals who are keenly interested in and intend to take another NCL cruise. However, in order to obtain full use and enjoyment of NCL public accommodations, Plaintiffs seek to enjoin Defendant's discriminatory conduct to prevent further harm.

27. NCL discriminated against the Plaintiffs on the basis of their disability, depriving them of the full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations in the Defendant's places of public accommodation. Accordingly, Defendant's actions and omissions violated 42 U.S.C. § 12182 (a) and 42 U.S.C. § 12182(b)(1)(A)(I).

28. NCL also used standards or criteria or methods of administration that had the effect of discriminating on the basis of disability, and perpetuated such discrimination by others subject to common administrative control in violation of 42 U.S.C. § 12182(b)(1)(D).

29. NCL imposed or applied unnecessary eligibility criteria that screened out, or tended to screen out, individuals with disabilities from fully and equally enjoying the Defendant's services, facilities, privileges, advantages, or accommodations. Thus, Defendants violated 42 U.S.C. § 12182 (b)(2)(A)(i).

30. NCL failed to make reasonable modifications in policies, practices, and procedures, when such modifications were necessary to insure Defendant's services, facilities, privileges, advantages, or accommodations were available to the Plaintiffs in the most integrated setting possible. Accordingly, Defendant violated 42 U.S.C. § 12182(B)(2)(A)(ii) and 42 U.S.C. § 12182 (b)(1)(B).

31. NCL also failed to remove architectural barriers in existing facilities or offer services in alternative settings when it was readily achievable to do so. 28 C.F.R. 36.304.

32. NCL further charged the Plaintiffs higher fares than non-disabled passengers and/or allowed or required Plaintiffs to pay other illegal surcharges for accessible features and/or modifications, 42 U.S.C. § 12182(b)(2)(A)(i) and 28 C.F.R. § 36.301 (c).

33. Additionally, NCL excluded or otherwise denied equal goods, services, facilities, privileges, advantages, accommodations or other opportunities to Plaintiffs because of their known association with a person with disability, in violation of 42 U.S.C. § 12182(b)(1)(E).

34. NCL's unlawful conduct and/or failures to act violated, and continue to violate, Plaintiffs' federal statutory rights, under Title III of the ADA, to be free from discrimination on the basis of disability, "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation." 42 U.S.C. § 12182, *et. seq.*

35. Accordingly, Plaintiffs sustained damages as a direct result of NCL's actions, omissions, practices, policies, and procedures, described above, which violated the ADA.

VII. INJUNCTIVE RELIEF

36. Plaintiffs adopt by Paragraphs 1 through 35 as though fully set forth herein.

37. The Plaintiffs reasonably expect to use NCL's cruise programs, services, activities, facilities, privileges, advantages, and public accommodations in the future, thus there is a real threat of future injury if the Defendant's discriminatory policies, practices, and procedures do not immediately end. This threat is particularly great due to the fact that the NCL has cruise routes and travel programs that are appealing to the Plaintiffs. Accordingly, since the Plaintiffs intend to take another NCL cruise, it is necessary that NCL's discriminatory practices end immediately to prevent further harm to the Plaintiffs.

38. As a result of NCL's barriers, practices, policies, and procedures, Plaintiffs have suffered, and will continue to suffer irreparable injury due to the Defendant's denial of their statutory rights. There are reasonable grounds to believe that Defendants will continue to engage in the acts and practices prohibited by the ADA. Consequently, injunctive relief is necessary to insure that Defendant complies with the law.

39. Unless injunctive relief is granted, Plaintiffs will continue to suffer immediate and irreparable injury for which there is no adequate remedy at law.

40. In order to enforce their rights under the law, Plaintiffs have had to retain counsel and thus they are entitled to recover attorney's fees, costs, and expenses.

VIII. PRAYER FOR RELIEF

41. THEREFORE, Plaintiffs respectfully pray this Court grant the following relief:

1. Assume jurisdiction over the claims of this complaint;

2. Enter a declaratory judgment stating that NCL's practices, policies, and procedures have subjected Plaintiffs to discrimination in violation of Title III of the ADA;

3. Issue an order permanently enjoining NCL from violating Title III of the ADA, 42 U.S.C. § 12181, *et. seq.* by failing and refusing to remove architectural barriers when it is readily achievable to do so; failing to make modifications to policies and procedures to insure equal access to goods and services in the most integrated setting; or failing to remove discriminatory policies, procedures and eligibility criteria;

4. Award Plaintiffs reasonable attorney's fees and cost of suit, and;

5. Grant Plaintiffs such other and further relief as this Court may deem just and proper and equitable.

DATED:_____

Respectfully submitted,

By: BRUCKNER BURCH PLLC

_____

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NORWEGIAN CRUISE LINE

7665 Corporate Center Drive
Miami, Florida 33126

Passenger Ticket Contract
Cruise Ticket
Do Not Separate Until Pier Check-in

BEST AVAILABLE COPY

VOID

VOID

IMPORTANT NOTICE
The Passenger's attention is specifically directed to the terms and conditions of this contract set forth below. These terms and conditions affect important legal rights and this passenger is advised to read them carefully

3/97 Ship's Registry: Bahamas

To Be Presented for Passage

NORWEGIAN CRUISE LINE

7665 Corporate Center Drive
Miami, Florida 33126

Passenger Ticket Contract
Passenger Copy

VOID

VOID

IMPORTANT NOTICE
The Passenger's attention is specifically directed to the terms and conditions of this contract set forth below. These terms and conditions affect important legal rights and the passenger is advised to read them carefully

3/97 Ship's Registry: Bahamas

Not Good for Passage

Passengers are advised to read the terms and conditions of the Passenger Ticket Contract set forth below. Acceptance of this Passenger Ticket Contract by Passenger shall constitute the agreement of Passenger to these Terms and Conditions.

Norwegian Cruise Line

Contract of Passage

Norwegian Cruise Line Limited d/b/a Norwegian Cruise Line

1. This passenger ticket contract (hereinafter "Contract") constitutes a contract of passage between the Carrier, Norwegian Cruise Line Limited d/b/a Norwegian Cruise Line (hereinafter referred to as "Carrier"), and the passenger or purchaser (whether or not named by or on his behalf). All the terms and provisions of all sides of this Contract, including all of the following matter printed below, are a part of this Contract to which the passenger and/or purchaser, both on his/her behalf and on behalf of any other person or persons, including children, for whom they accept to be purchased, acknowledge and agree to be bound thereby by accepting this Contract or transportation from the Carrier. The face limitation only the transportation be specified herein. All inland, ordinary freight, food, but does not include spirits, wine, beer, sodas or mineral waters. This Contract shall be the entire agreement between the parties and supersedes all representations or conditions contained in Carrier's advertisements, rates, brochures or other literature and all promises and agreements made or claimed to have been made to or with the passenger or anyone representing him by any party.
2. This ticket is valid only for the voyages specified on the front hereof and for the person or persons named on the front hereof as passenger or passengers and cannot be transferred without Carrier's written consent. The fare paid hereunder ("Passage Money") shall be considered fully earned at the time of payment, or if not previously paid, then at the time of embarkation. Carrier shall not be liable or make any refund to passenger in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger, any amount or other governmental regulation to the contrary notwithstanding, the benefit of which Carrier or passenger hereby expressly waives. Carrier reserves the right, in its sole discretion, to cancel any scheduled call or any part for any reason at any time whether before, during or after sailing of the vessel, without prejudice to Carrier as to the passenger, and without liability to the passenger, for any loss, damage or delay whatsoever, however consequential.
3. Passenger is not allowed to bring on board the vessel without the previous written permission of the Carrier any intoxicating liquors or beverages, firearms, weapons of any kind, ammunition, explosive substances or any goods of a dangerous nature, nor dogs, including seeing eye dogs, cats, birds, or other animals of any kind and description whatsoever.
4. Carrier's responsibility shall never exceed the usual amounts of limitation of liability to which Carrier is entitled under applicable law. No undertaking, guaranty or warranty is given or shall be implied as to the seaworthiness, fitness, or condition of the vessel or any food, drink, medicine, or provisions supplied on board the vessel, or its ports of call. Carrier be liable for any statutory which occurs outside the passenger areas of the vessel or food, including, but not limited to, accidents occurring ashore, on tenders not owned by the vessel, on or resulting from equipment not a part of the vessel, or upon docks or piers. This exemption from liability here in contained shall extend to each of the employees, officers, agents, servants and representatives of the Carrier.
5. The passenger admits a full understanding of the nature and character of the vessel and assumes all risks of vessel, transportation and handling of passengers and baggage. The passenger assumes the risk of, and agrees that the Carrier and the vessel shall not be liable for (a) injury, death, or delay of or to the passenger, or (b) loss, damage or delay to the passenger's baggage, personal effects, or property arising from, caused by or on the judgments of the Carrier or Master rendered reasonably or advisable by reason of any act of God or public enemies, arrest, restraints of princes, rulers of people, piracy, war, intervention, terrorist, sedition or threats, hijacking, bombing, threatened or actual rebellion, insurrection, civil strife, fire, explosion, collision, stranding, grounding, perils of the sea, illness, strikes, labor or other vessel, perils of navigation of any kind, lack or labor or passengering in vessels, theft, quarantine to or from mandatory, bailment, or violent conduct even though relating to embarkation or commencement of voyages, flattery, detention or arrests of any kind, by legal process, strike, lockouts or labor disturbance, whether or not such strike, lockout, or labor disturbance results from a dispute between the Carrier and his employees or between other persons, whether or not the fault of the Carrier or those because of any such reasons the Carrier's control, whether or not at any or whether such risk is the Passenger.

6. (a) Each passenger will be allowed 200 pounds of baggage free of charge. Any excess will be charged for at the current rate for baggage payable before embarkation, subject to the right of the Carrier to limit the amount of such excess that may be carried.
(b) Wherever the term "baggage" or luggage herein, it shall mean only suitcases, valises, satchels, bags, hangers or bundles and their contents consisting of such personal wearing apparel, articles of personal adornment, toilet articles and similar personal effects as are necessary and appropriate for the purposes of the cruise and all other such personal property of the passenger not in a container. No tools of trade, household goods, computers, musical instruments, radios, televisions, electronic equipment, personal recreational and/or sporting equipment, medications, perfumes, beverage products, liquors, fragile items, bullion, jewelry, precious stones, dentures, optical devices, including contact lenses, watches, money, documents, valuables of any description or such articles as are specified in 46 U.S. Code, Paragraph 181 shall be brought upon the vessel by passenger or contained in passenger's baggage, except under and subject to the terms of a special written contract entered into with the carrier before embarkation upon application of the passenger. The passenger hereby warrants that no such articles have been stowed on the vessel or are contained in any receptacle or container presented to him as baggage hereunder. Carrier cannot accept responsibility for and in no event shall be liable in any capacity for loss of damage to such articles as are set forth in this paragraph.
(c) It is stipulated that the aggregate value of the passenger's baggage under this ticket does not exceed $100.00 and any liability of the Carrier or the vessel for any cause whatsoever with respect to said baggage shall not exceed such sum unless the passenger shall in writing specify its true value and pay to the Carrier before embarkation 5% on the excess of such value, in which case the Carrier's liability shall be limited to the actual damage sustained up to, but not exceeding such specified value.
(d) All disclaimers and limitations of liability contained herein shall apply to all valuables stored or advertised for storage by Carrier, including valuables stored with the Carrier in safety deposit boxes or security envelopes. Carrier cannot accept responsibility for and in no event shall be liable for loss or damage or valuables left in cabins.
(e) Loss of or damage to baggage during loading or disembarking must be reported by the passenger to Carrier's personnel prior to departing the U.S. Customs area. Carrier shall not be responsible for any such loss or damage which is not so reported.
(f) No suits, including, without limitation, suits brought in rem and suits brought in personam shall be maintainable against the vessel or the Carrier upon any claim in connection with this Contract relating to baggage or any other property unless written notice of the claim, with full particulars, shall be delivered to the Carrier or its agent at its office at the port of sailing or at the port of termination within ten (10) days after termination of the voyage to which this Contract relates. In no event shall any suit for any cause against the Carrier with respect to baggage or property be maintainable unless such suit shall be commenced within two (2) months after termination of the voyage.
(g) Liability if any, for loss or damage to baggage occurring elsewhere than on board the vessel in connection with air, rail, motorcoach, ground transfers, porters, stevedores and/or hotels shall rest solely with the person or entity providing such services and passenger agrees that Carrier does not guarantee the performance of such services and shall not be liable in any respect or capacity for any such loss or damage.
7. If the vessel does not sail on or about the scheduled or advertised date for any reason whatsoever including fault of Carrier, Carrier shall have liberty to substitute any other vessel or means of transportation whether owned or operated by Carrier or not and to re-berth passengers thereon at, at Carrier's option, to refund the passage money paid.
8. Carrier shall have full liberty to proceed without pilots and tow and to assist vessels in all situations; to deviate from the direct or customary course for any purpose, including, without limitation, in the interest of passengers or of the vessel, or to save life or property; to put in at any unscheduled or unadvertised port; to cancel any scheduled call at any port for any reason and at any time; to omit, advance or delay landing at any scheduled or advertised port; to put back to port of embarkation or to any port previously visited if Carrier shall deem prudent; all without prior notice and without incurring any liability to the passenger on account thereof.
9. Carrier has an absolute right to transfer passenger and/or his baggage to other carriers, whether by vessel, rail or air, to or toward the ultimate destination. In the event such substituted passage is for the convenience of the Carrier, it shall be at Carrier's cost. Otherwise it shall be at the cost of the passenger.
10. In making any arrangements, the transportation of any passenger or his or her baggage by any carrier, connecting carrier or otherwise, or in making any arrangements for shore accommodations, victualling, amusement or entertainment for any passenger, or for any other service or facility whatsoever for any passenger otherwise than aboard Carrier's ships or such tenders aforesaid, it is understood and agreed that Carrier is acting solely in the capacity of agent for the party or parties who own, furnish or operate such services or facilities and that the same are provided subject to such terms, if any, appearing in the tickets, vouchers or notices of such party or parties. Nor does Carrier assume responsibility nor guarantee the performance of any such services or facility. Neither the Carrier or the vessel shall be liable for the act, neglect, default or omission of any party in respect to any events, matters or things other than aboard Carrier's ships or tenders.
11. In the case of quarantine, each passenger must bear all risks, losses and expenses caused thereby and will be charged for maintenance, payable day-by-day if maintained on board the vessel for such period of quarantine. Passenger assumes all risks and losses occasioned by delay or detention howsoever arising. Costs connected with embarkation or disembarkation of passengers and/or baggage and costs of transfer between vessel and shore must be borne by the passenger.
12. In the event of personal injury to the passenger whether resulting in death or otherwise from any cause whatsoever for which Carrier or the vessel may be liable, the damages recoverable by the passenger or his or her surviving spouse, executors, administrators, estate, legal representatives, heirs, and next of kin shall not exceed either the sum of $6,000.00 per occurrence or the amount recoverable by such passenger under any applicable limitation of liability statute which Carrier or the vessel may enforce in the applicable forum, whichever is lesser.
13. No suit including without limitation, suits brought in rem and suits brought in personam shall be maintained against the vessel or the Carrier for delay, detention, personal injury, illness or death of passenger unless written notice of the claim with full particulars be delivered to the Carrier or its agent at its office at the port of sailing or at the port of termination within one hundred eighty-five (185) days from the day when such delay, detention, personal injury, illness or death of the passenger occurred, and in no event shall any suit for any cause, including, without limitation, suits brought in rem and suits brought in personam be maintained against the vessel or the Carrier with respect to delay, detention, personal injury, illness or death be maintainable, unless suit shall be commenced within one (1) year from the day when the delay, detention, personal injury, illness or death of the passenger occurred, notwithstanding any provision of law of any state or country to the contrary.
14. Carrier reserves the right to refuse or revoke passage to persons who in Carrier's sole judgment may be refused admission into a port of landing or into the country of destination or for persons who may be suffering from a contagious disease or who for any other cause may endanger themselves or others or be or become obnoxious to others. Upon refunding the amount paid hereon or the prorata portion thereof, as the case may be, after deduction of expenses incurred by Carrier on account of such person or persons, Carrier shall be discharged from all further liability.
15. All berths are let on condition that passengers may be transferred from one cabin to another if required to accommodate other passengers. Such transfer will be made into cabins as similar as practicable. All unoccupied berths are to be let at intermediate ports.
16. In addition to all of the limitations, exemptions and limitations of liability provided by the Contract, Carrier and the vessel shall have the benefit of any statutory limitation of liability or exemption of liability available in the applicable forum, including but not limited to 46 U.S. Carr. Pg. Supp. 181 through 196, the International Convention Relating to Limitation of the Liability of Seagoing Ships 1957 (the Brussels Convention) and the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974 (the Athens Convention).
17. The price of passage hereunder has been fixed partly with reference to the liability assumed by Carrier as defined in the Contract, and no agreement, alteration or amendment enlarging any other or different liability shall be valid unless made in writing and signed by Carrier's authorized agent, or either at the port of embarkation.
18. Upon embarkation, the Passenger shall have in his possession and assumes all responsibility for obtaining all visas, travel and health documents required by any governmental authority and if he fails to do so Carrier shall have no further obligation to transport or to furnish immigration to the passenger. Passenger shall indemnify Carrier for all penalties, fines, charges, taxes and expenses imposed upon or incurred by Carrier due to passenger. Any taxes and stamps on tickets and taxes or fines on passenger, embarkation expenses, and all expenses of such a nature are to be paid by passenger. Carrier shall have the right to deny boarding and shall not be liable to refund passenger's fare if passenger is denied boarding due to lack of proper documents.
19. Passengers will not be liable to pay nor entitled to receive any general average contribution in respect to property taken with them on the vessel.
20. If the vessel carries a surgeon, physician, barber, hair dresser, masseuse, or any individual providing personal services or, if the vessel requests emergency medical transportation or emergency medical care for the passenger on his behalf, it is done solely for the convenience of the passenger and any such person or entity in dealing with the passenger is not and shall not be considered in any respect whatsoever as the employee, servant or agent of the Carrier, but shall be considered an independent contractor. Carrier shall not be liable for any act or omission of such person or entity or those under his or their orders or assisting them with respect to any diagnoses, medication, treatment, advice or care of any kind given to any passenger. Each such person or entity shall be entitled to make a proper charge for any services performed for or on behalf of the passenger and the care of such charge shall be the sole responsibility of the passenger and Carrier shall not be concerned in any way whatsoever in any such arrangement. Any charges incurred by passenger for medical reasons, including, but not limited to, physicians, surgeons, hospitals, medevacs, diagnostic facilities, air ambulance evacuation or ground ambulance, shall be the sole responsibility of passenger. Passenger hereby agrees to reimburse and indemnify Carrier for any funds advanced on account of any such charges.
21. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction in which this Contract is sought to be enforced, or for any other reason, said provision is deemed to be severed from the Contract and shall be of no effect, but all remaining provisions hereof shall remain in full force and effect.
22. The passenger shall be liable to and shall reimburse Carrier for all damage to the vessel and his furnishings and any equipment or property of the Carrier caused directly or indirectly, in whole or in part, by any act or omission of the passenger, whether wilful or negligent. The passenger shall further indemnify the owner and vessel and each and all of their agents and servants against all liability whatsoever which the Carrier or the vessel or such agents or servants may incur towards any person, company or government arising from any personal injury, death or damage to property caused directly or indirectly, in whole or in part, by any wilful or negligent act or omission on the part of the passenger. The passenger shall indemnify the Carrier and/or the vessel and/or the Master for any fines or penalties imposed on the vessel by governmental authorities for his failure to observe or comply with local requirements in respect of immigration, customs and excise taxes or any other governmental regulations whatsoever.
23. If this Contract is issued for, or in connection with, any passage at a reduced rate from the full regular fare ordinarily charged thereafter, and whether the reduction is in connection with an "Off Season" or "Low Season" sailing or at any reduced rate by whatsoever designation or nature, this contract is only available for use on the sailing for which issued unless, upon Carrier's determination that available space exists, the passenger pays to Carrier the difference between the reduced rate and the full regular fare. The passenger agrees that any travel agent utilized by passenger in connection with the purchase or issuance of this Ticket is passenger's agent and passenger shall remain liable to Carrier for the full tariff rate of passage.
24. Whenever the term "Carrier" is used herein, it shall mean and include the vessel, its tenders, owners, operators and charterers. The Master, agents, brokers, officers and crew of the vessel and of the Carrier shall have the benefit of all the terms and conditions of this Contract. The term "passenger" shall include the plural where appropriate and all persons engaging to and/or traveling under this Contract. The masculine includes the feminine.
25. Carrier reserves the right to increase fares without prior notice. In such event passenger has the option to accept and pay such increase, or to cancel passenger's reservation without penalty, not less than one (1) month prior to departure.
26. Carrier shall not be liable for any injuries or damages which occur while participating in athletic or recreational activities aboard the vessel or ashore at any port of call, including, but not limited to, passenger participation in snorkeling programs or passenger usage of any shuffle ball, gymnasium, jogging, swimming, diving, health club and sauna facilities. By utilizing said facilities, passenger agrees to assume all risks arising therefrom and does hereby fully release and discharge Carrier from any and all claims, demands, their agent, causes of action, present or future, whether the same be known, or unknown at present, resulting from or arising out of passenger's use or intended use of said facilities.
27. Any disability requiring special attention or treatment must be reported to Carrier when reservation is requested. A medical certificate certifying fitness for travel may be required of any passenger at Carrier's request. Any person having had surgery less than three (3) months prior to sailing must submit a letter from a qualified physician stating that he or she is fit to travel, and Carrier reserves the right to deny passage if the person, in the sole judgment of Carrier, may require some kind of special attention during the voyage. Pregnancy may be regarded as a physical disability and application for passage from an expectant mother must be accompanied by a medical certificate certifying her fitness for travel. Carrier reserves the right to refuse passage to women in advanced stages of pregnancy (third trimester of pregnancy). Handicapped persons are advised that certain international safety rules, ordinances and U.S. Coast Guard Regulations may cause difficulty for mobility-impaired persons or persons with advisory impaired sight and/or hearing. For reasons of passenger safety and well-being, Carrier may require such persons to be accompanied by and share the same cabin with, an adult who is not physically impaired as aforesaid. Passengers confined to wheelchairs must provide their own lightweight standard size wheelchair (23½ inches wide), as those wheelchairs which may be available on the vessel are for emergency use only. Carrier reserves the right to refuse or withdraw passage to anyone who fails to notify Carrier of a physical disability, or who is, in the sole judgment of Carrier, in such physical or mental condition so as to be unfit for travel, or who may require care, treatment and attention beyond that which Carrier can provide. Carrier reserves the right to refuse or deny participation in any activities or programs either aboard the vessel or ashore at any port of call which are sponsored or promoted by Carrier to any passenger who has, in the sole judgment of Carrier, past or present medical conditions that may present risks in such activity and programs, including, but not limited to, participation in Dive-In, Babies and Mini-Bike Programs on or off the vessel.
28. This Contract shall be governed in all respects by the laws of the State of Florida and the laws of the United States of America. It is hereby agreed that any and all claims, disputes or controversies whatsoever arising from or in connection with this Contract and the transportation furnished hereunder shall be commenced, tried and litigated, if at all, before a court of proper jurisdiction located in Dade County, Florida, U.S.A.

3/97

(18)

No. 03-1388

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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December 3, 2004

QUESTION PRESENTED

Whether and to what extent Title III of the Americans With Disabilities Act applies to companies that operate foreign-flagged cruise ships within United States waters.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Julia Hollenbeck, David T. Killough, and Ana Spector. Rodger Peters was a party to the proceedings below but has since passed away.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-15a) is published at 356 F.3d 641. The district court's memorandum and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 16a-47a), dated September 9, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. This Court granted certiorari on September 28, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Petition Appendix at 50a-74a.

STATEMENT

This case concerns the application of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, to cruise lines operating within U.S. waters and in U.S. ports. The Fifth Circuit's ruling in this case gives cruise lines carte blanche to discriminate against U.S. passengers with disabilities simply because their ships fly a foreign flag of convenience. The court of appeals did not dispute that, by its terms, the ADA applies to both cruise line operators and their ships, which plainly are "public accommodations" and means of "public transportation" covered by the statute. But it found dispositive that the statute does not expressly state that it governs foreign-flagged vessels, which account for approximately ninety-seven percent of the cruise industry's operations.

The Fifth Circuit's conclusion that Congress exempted cruise line operations in U.S. territory from the ADA is implausible. It is impossible to believe – and contrary to

centuries of this Court's precedents to presume – that Congress intended that cruise lines such as respondent that engage in the façade of foreign flagging would be free to discriminate against *Americans* when operating *in U.S. territory*. As this case illustrates perfectly, respondent's operations have an overwhelming U.S. nexus. Petitioners are U.S. citizens who took a cruise that both departed from and returned to a U.S. port. Respondent cruise line has its principal place of business in the U.S. and derives most of its revenue from passengers who are U.S. citizens. Petitioners traveled using tickets that were issued in this country and that, by respondent's own design, include a U.S. choice-of-law clause. And, most importantly, petitioners' claims involve respondent's conduct in U.S. territory. There is no serious basis to conclude that Congress intended to carve this recurring factual scenario out of the ADA's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

1. Respondent Norwegian Cruise Line Ltd. (NCL) is a multi-billion-dollar corporation with its principal place of business in Miami, Florida. Pet. App. 16a. NCL operates cruise ships that regularly sail from, and return to, U.S. ports. The ships generally sail under foreign flags – in this case, the flag of the Bahamas. Resp. C.A. Br. 4; Pet. App. 16a-17a.

Petitioners consist of two groups of individuals, all U.S. citizens. The first are persons with disabilities – specifically, mobility impairments – covered by the ADA. J.A. 9 (Compl. ¶ 6). The second are the companion petitioners: individuals who accompanied the petitioners with disabilities and whom the ADA also protects against discrimination. See *ibid.*; 42 U.S.C. 12182(b)(1)(E).

In 1998 and 1999, petitioners purchased tickets, issued by respondent in this country for travel on respondent's cruise ships. J.A. 11 (Compl. ¶ 17); *id.* 18-19 (NCL Passenger Ticket). NCL tickets provide that disputes between the parties will be governed by U.S. law. *Id.* 19, ¶ 28. Petitioners

embarked on their round-trip cruises from the Port of Houston, Texas, located at the end of the Houston Ship Channel, fifty miles inland from the Gulf of Mexico. *Id.* 10-11 (Compl. ¶¶ 13, 15, 17).

Petitioners allege that respondent's discriminatory policies, programs, and practices denied them the "full and equal enjoyment" of its "goods, services, privileges, advantages or accommodations" in violation of Title III of the ADA. J.A. 11-12, 14 (Compl. ¶¶ 17, 19, 27); 42 U.S.C. 12182(a); *id.* § 12182(b)(1)(E). The statute prohibits discrimination against persons with disabilities in the provision of places of public accommodation, *id.* § 12182(a), and "specified transportation services," *id.* §§ 12184(a), 12181(1)(A)-(C). With respect to the ADA's application to physical barriers to access, the statute requires the place of public accommodation or public transportation service to remove barriers in existing facilities "where such removal is *readily achievable*." *Id.* § 12182(b)(2)(A)(iv) (emphasis added); *id.* § 12184(b)(2)(C). Acting pursuant to a congressional delegation of authority, *id.* § 12186(a)(1), (b), the Departments of Justice (DOJ) and Transportation (DOT) have concluded that the ADA applies to foreign-flagged cruise ships. 28 C.F.R. pt. 36, App. B, at 677 (2004); 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991).

The petitioners with disabilities allege that, both prior to and during their cruises, respondent subjected them to a variety of discriminatory practices and policies. For example, respondents charged petitioners higher fares to reserve one of the few accessible cabins on board, excluded them from important safety programs, and failed to make reasonable modifications to barriers to access. J.A. 11-12, 15 (Compl. ¶¶ 14, 16, 17, 19, 31). The companion petitioners allege that respondent discriminated against them on account of their association with the disabled petitioners: it required them to pay higher fares to reserve accessible cabins and effectively restricted them from leaving their companions with disabilities alone, forcing them to miss events in inaccessible

locations. *Id.* 11-12 (Amended Compl. ¶¶ 16, 18); Pet. C.A. Br. 5 n.2, 6; Pet. Dist. Ct. Br. 2 n.1, 20 n.19.

2. In 2000, petitioners filed this putative class action in the U.S. District Court for the Southern District of Texas, seeking declaratory and injunctive relief under Title III of the ADA to remedy respondent's widespread, unlawful discriminatory practices and policies. Petitioners, joined by the U.S. government as *amicus curiae*, argued that the ADA applies to respondent and its foreign-flagged ships. The district court accepted that argument, agreeing with rulings of the Eleventh Circuit and another district court that "Title III applies to all cruise ships within the territorial waters of the United States, including those registered under foreign flags." Pet. App. 35a. See *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (CA11 2002); *Deck* v. *Am. Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). Cruise ships, the district court explained, fit within the definitions of both "public accommodation" and "specified public transportation." Pet. App. 23a, 25a. Moreover, the district court found that the determinations of both DOT and DOJ that Title III applies to cruise ships were entitled to deference. See *id.* 22a-25a.

The district court furthermore rejected respondent's argument that the ADA could not be applied to respondent's ships because in a few isolated respects Title III supposedly conflicts with the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, *reprinted in* SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001). Pet. App. 25a-28a. That argument necessarily addressed only claims seeking permanent structural modifications to respondent's ships; it did not address petitioners' myriad other claims. *Id.* 28a. Even as to structural modifications, the district court concluded that the mere "possibility" of such a conflict was insufficient to justify dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6). *Id.* 26a. The

court also held that the ADA addressed potential conflicts with "new construction and alteration standards external to the ADA" – including those imposed by SOLAS – by requiring only "readily achievable" modifications. *Id.* 26a-27a (citing 42 U.S.C. 12182(b)(2)(A)(iv)). The court reasoned that if a particular modification conflicted with a treaty, it would not be "readily achievable." In such cases, the statute would instead require respondent only to "make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." *Id.* 27a-28a (citing 42 U.S.C. 12182(b)(2)(A)(v)).

The district court granted respondent's motion to dismiss, however, with respect to a narrow group of petitioners' claims implicating permanent structural alterations to the ships. Although the ADA's general requirement of "readily achievable" barrier removal in existing facilities is self-executing, see 42 U.S.C. 12182(b)(2)(A)(iv), the court found it significant that, at that time, DOJ and DOT had not yet issued cruise-ship-specific Title III regulations regarding new construction and alterations.[1] Pet. App. 41a-42a. While acknowledging that there are "significant differences" between regulations governing *new* construction and

[1] Under the ADA, the Architectural and Transportation Barriers Compliance Board ("Access Board") is responsible for adopting, pursuant to a rulemaking process, guidelines for the accessibility of facilities and vehicles. 42 U.S.C. 12204(a); *id.* § 12186(c); 69 Fed. Reg. 69,246, 69,247 (Nov. 26, 2004). DOJ and DOT are then required to "adopt, in their regulations, minimum standards that are consistent with the Access Board's guidelines." 69 Fed. Reg. at 69,247.

On November 26, 2004, the Access Board issued an Advance Notice of Proposed Rulemaking (ANPRM) and made draft guidelines for large passenger vessels available for public comment. See Draft Passenger Vessel Accessibility Guidelines and Supplementary Information, *available at* http://www.access-board.gov/pvaac/guidelines.htm. On the same day, DOT issued its own ANPRM, which will lead, following a rulemaking process, to regulations consistent with the final Access Board guidelines. 69 Fed. Reg. at 69,247.

alterations, see *id.* 37a (citing 42 U.S.C. 12183), and regulations concerning "barrier removal in *existing* facilities," see *id.* 37a-38a (citing 42 U.S.C. 12182) (emphasis added), the district court nonetheless held that the absence of regulations governing the former precluded petitioners' claims relating to the latter. *Id.* 42a.

3. Both sides appealed, with the United States again supporting petitioners. The Fifth Circuit accepted the district court's certification of its decision for interlocutory appeal. The court of appeals assumed without deciding that Title III generally applies to cruise ships and the companies that operate them. Pet. App. 4a n.3. But it held that all of petitioners' Title III claims were categorically barred.

The court of appeals rested its holding on its conclusion that Title III lacks a required express statement of Congress's intent to apply "domestic statutes to foreign-flagged ships." *Id.* 7a-8a. It derived that "plain statement" requirement from precedents of this Court addressing whether U.S. labor law conferred rights on foreign seamen on foreign-flagged ships. *Id.* 4a-5a (citing *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). The court of appeals also stated that its holding was supported by what it asserted was a "stark likelihood of conflicts" between petitioners' permanent barrier removal claims and "the standards set out in [SOLAS]." *Id.* 9a. And it further held that Title III lacks a required "plain statement" of intent to apply domestic law extraterritorially. The court reasoned that "many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." *Id.* 11a.

The Fifth Circuit acknowledged that its ruling was contrary not only to the decisions of other courts but also to the judgment of the administrative agencies to which Congress had delegated authority to implement the ADA.

But the Fifth Circuit rejected those rulings and refused to defer to the agencies' conclusions, which it deemed mere "informal administrative opinions." Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

4. The full Fifth Circuit denied a petition for rehearing *en banc*. Pet. App. 48a-49a. This Court subsequently granted petitioners' petition for certiorari. See 125 S. Ct. 26 (2004).

SUMMARY OF ARGUMENT

The Americans With Disabilities Act is the nation's promise to millions of persons with disabilities that they will be treated as full citizens, protected against arbitrary discrimination and barriers to their opportunity to pursue their lives to the fullest. Respondent Norwegian Cruise Line, however, claims that it has the right to flout that promise, and the Fifth Circuit agreed. There is no dispute that petitioners are U.S. citizens, that they bought tickets from respondent in this country, that the tickets call for the application of U.S. law to disputes between petitioners and respondent, and that the discrimination in question takes place in our nation's territory. But the court of appeals held that the ADA does not apply to respondent because of a single fact: that, purely as a matter of convenience, respondent has adopted the façade of flying the flag of a foreign nation. That holding cannot stand.

I. Title III of the ADA applies to cruise ships, and the Fifth Circuit did not contend otherwise. Respondent's vessels are both places of "public accommodation" and covered "means of public transportation" under the statute. Indeed, a cruise ship typifies the type of facility that Congress determined should be accessible to the disabled, as it contains lodging, restaurants, and multiple forms of entertainment in close proximity to each other and each of the ship's destinations, an ideal format for persons with mobility impairments in particular.

No characteristic unique to cruise ships entitles them to an implied exemption from Title III. Respondent's acts of discrimination are indistinguishable from on-land conduct

that courts and regulatory authorities have repeatedly found to be unlawful. This discrimination is in no way necessitated by the nature of cruise ships, for much of NCL's illegal conduct is entirely unrelated to physical barriers onboard the ships and respondent's competitors do not engage in it. For example, respondent requires persons with disabilities to identify themselves as having a disability, waive any potential medical liability, and travel with a companion who has no disability. Respondent provides far less favorable accommodations to persons with disabilities, yet charges them higher prices. Respondent reserves the right to remove a person with disability from the vessel if her presence endangers the "comfort" of other guests. It provides no accessible restrooms in its boarding area, yet requires the passengers with disabilities to wait there for long periods before boarding. And it holds evacuation drills on decks of the ships that are not accessible to passengers who use a wheelchair or scooter.

The barriers to access on the ships are serious, but could easily be remedied by NCL. None of the public restrooms are accessible. Given other obstacles onboard, persons such as petitioners with mobility impairments can literally spend hours attempting to reach an accessible restroom in their cabins, but merely switching the direction of the doors in bathroom stalls could make many public bathrooms accessible. The coamings at the base of some doors that create barriers to access could easily be ramped or accessible routes could be identified. Plainly, then, application of the ADA to respondent's operations and ships is essential to effectuate Congress's determination to eliminate arbitrary and unwarranted discrimination against persons with disabilities.

II. The Fifth Circuit's contrary holding rests on the fact that Congress did not include in Title III an express statement that the statute applies to foreign-flagged vessels. That ruling fails under any of the three arguably relevant lines of this Court's precedents.

The controlling decisions are those in which the Court has addressed the applicability of U.S. law in U.S. territory for the protection of U.S. citizens (as opposed to a foreign crew) in relation to a foreign-flagged vessel. In *every* case in which this Court has confronted that issue, it has held that the statute applied to foreign-flagged vessels despite the absence of the plain statement required by the Fifth Circuit in this case. Certainly, nothing in the ADA overcomes the presumption established by those decisions that Congress intends U.S. law to apply in U.S. territory to protect U.S. citizens. To the contrary, given that the ADA by its terms applies to cruise ships and that almost every cruise ship is foreign-flagged, it necessarily follows that Congress did not intend to exempt respondent's foreign-flagged operations.

If this Court were nonetheless to look instead to decisions addressing the application of U.S. law to the *crew* of a foreign-flagged vessel, petitioners would still prevail. The most analogous precedents involve maritime torts, with respect to which the Court has not adopted a plain-statement requirement but instead has applied a multi-factor choice-of-law test. Under that standard, Title III unquestionably applies, for the relevant conduct occurred in the United States, petitioners are U.S. citizens, the contract calls for the application of U.S. law and was formed in this country, petitioners cannot secure relief in another forum, the suit was filed here, and respondent is based in the United States. The Court has definitively held that the one factor on which the Fifth Circuit rested its decision – respondent's choice of a foreign flag of convenience – is a "façade" entitled to "minor weight[]." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970).

The Fifth Circuit instead looked to yet a third line of decisions addressing whether U.S. unionization rights apply the world over to foreign crews who happen to stop in this country and whether federal labor law applies to efforts to pressure foreign-flagged ships to use more expensive U.S. crews wherever they travel. Although those cases bear no

resemblance to this one, petitioners prevail if they apply. For the Court has held that when the rights of Americans in the U.S. territory are at stake, federal labor law *does* apply to foreign-flagged vessels despite the absence of any plain statement to that effect in the relevant statute. *Int'l Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970).

Nor is the decision below supported by the suggestion that application of Title III to cruise ships would conflict with our nation's treaty obligations. Most of petitioners' claims have nothing to do with the issue addressed by treaty: the physical construction of ships. Even as to physical barriers to access, the court of appeals relied on a report suggesting the existence of only two such conflicts. Newly proposed regulations obviate even those incidental concerns. To the extent actual conflicts are later identified, they (i) are properly resolved by the U.S. regulatory authorities charged with implementing the ADA and the treaty, and (ii) are addressed within the framework of the statute, which calls for the removal of barriers to access only when "readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv), a standard that would not require removal if removal would be contrary to a treaty obligation.

The judgment below should accordingly be reversed.

ARGUMENT

I. THE ADA CLEARLY PROHIBITS CRUISE LINES FROM DISCRIMINATING AGAINST PERSONS WITH DISABILITIES.

In enacting the ADA, Congress sought nothing less than "the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Indeed, the ADA's chief sponsor, Senator Tom Harkin, deemed the Act "the 20th Century Emancipation Proclamation for people with disabilities." BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT xi (1990); see also 135 CONG. REC. S10,708, S10,714 (1989) (statement of Sen.

Hatch) (characterizing the ADA as "the most sweeping piece of civil rights legislation since the Civil War era").

Accessible cruise ships are prototypical attractive vacation options for persons with disabilities. They are effectively "personal floating resorts" that offer "lectures on interesting topics, first class entertainment, casinos, gyms, pools and spas" all in one place. Alexandria Berger, *For the Disabled, Cruises Are Now An Easy Vacation*, VIRGINIAN-PILOT (Norfolk, VA), Jan. 7, 2002, at E3. Cruises are also "a convenient way for people with disabilities to travel," as they can visit different ports of call without having to pack and unpack, see Humberto & Georgina Cruz, *A Medical Difficulty Is No Reason to Sit At Home*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 22, 2002, at 6E, and, at the same time, have access to the ship's medical services, see Tricia A. Holly, *Serving a Special Niche*, TRAVEL AGENT, Apr. 2, 2001, at 28. Indeed, a recent survey of Americans with disabilities revealed that twelve percent of those surveyed had taken a cruise within the last five years; of those twelve percent who had taken a cruise, fifty-nine percent reported that they had booked a subsequent cruise. See Curtis D. Edmonds, *Won't You Let Me Take You on a Sea Cruise: The Americans With Disabilities Act and Cruise Ships*, 28 MAR. LAW. 271, 271 (2004).

The cruise industry is also a major and expanding part of the U.S. travel industry and is thus squarely encompassed within the ADA's broad sweep. In 2003, there were 7.48 million cruise line passengers who were U.S. residents, as compared to 6.09 million in 2000. Bus. Research & Econ. Advisors, The Contribution of the North American Cruise Industry to the U.S. Economy 2 tbl.ES-1 (2004), *at* http://www.iccl.org/resources/2003_economic_study.pdf. At an average gross revenue of $1,498 per passenger, *id.* at 16 tbl.3, the cruise industry earned over $11 billion last year from U.S. residents. The United States therefore has an overwhelming interest in the operation of this industry and the safety and dignity of its U.S. resident passengers.

A. Cruise Ships Are Subject to Title III.

1. Cruise ships are subject to Title III's nondiscrimination and accessibility requirements because they fall within two of the categories identified by the text of the statute. First, cruise ships contain various "public accommodations," including: "place[s] of lodging" – *viz.*, the cabins where passengers stay, 42 U.S.C. 12181(7)(A); "restaurant[s], bar[s], or other establishment[s] serving food or drink," *id.* § 12181(7)(B); "place[s] of exhibition or entertainment," *id.* § 12181(7)(C); and "place[s] of exercise or recreation," *id.* § 12181(7)(L).

Second, cruise ships are means of "specified public transportation." "The term 'specified public transportation' means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." *Id.* § 12181(10); see also *id.* § 12181(1)(B), (C) (defining the "commerce" regulated by Title III to include "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country").

2. The text of Title III thus clearly encompasses cruise ships. But even if Title III were less than plain, any ambiguity would be resolved by the regulations issued by DOJ and DOT. DOJ has concluded that cruise ships are subject to Title III.[2] Similarly, DOT has concluded that cruise

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[2] See 28 C.F.R. pt. 36, App. B, at 677 (2004) (noting, for example, that "a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are 'necessary'" under Title III). Similarly, DOJ's Title III Technical Assistance Manual, which outlines "what businesses * * * must do to ensure access to their goods, services, and facilities," see DOJ, ADA Regulations and Technical Assistance Manuals, *available at* http://www.usdoj.gov/crt/ada/publicat.htm, expressly indicates that Title III applies to cruise ships. See, *e.g.*, DOJ, Title III Technical Assistance Manual III-4.1100, -5.3000 (1993) (using cruise ships as examples in two

ships "clearly are within the scope of a 'specified public transportation service'" subject to Title III. 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991).

The DOJ and DOT conclusions have all the hallmarks of agency determinations entitled to deference. First, Congress specifically authorized both agencies to issue implementing regulations under Title III. See 42 U.S.C. 12186(b); *id.* § 12186(a). Second, the agencies issued the regulations after a public notice-and-comment period and, indeed, both agencies received comments concerning whether cruise ships were covered. 56 Fed. Reg. 35,544, 35,544-45 (July 26, 1991) (DOJ); 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991) (DOT). Third, both agencies have maintained the same position consistently for almost thirteen years, see *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002) (longstanding interpretation entitled to deference), and Congress has never questioned that construction of the statute in amending Title III, see *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (Congress is deemed to have acquiesced to regulatory constructions it leaves in place); see, *e.g.*, Pub. L. No. 104-59, 341, 109 Stat. 568, 608 (1995) (amendment to 42 U.S.C. 12186).

3. Title III treats existing facilities – like the ships at issue in this case – differently from new facilities and newly altered facilities. Existing facilities are subject to the "readily achievable" standard of 42 U.S.C. 12182(b)(2)(A)(iv) – defined as "easily accomplishable and able to be carried out without much difficulty or expense," *id.* § 12181(9). By contrast, newly constructed and newly altered facilities are required to be "readily accessible to and usable by people with disabilities," *id.* § 12183(a)(1), a standard that imposes a greater obligation on those facilities' owners. DOJ and DOT

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illustrations), *available at* http://www.usdoj.gov/crt/ada/taman3.html; *id.* III-1.2000(d) (1994 Supp.) (cruise ships "must comply with the applicable requirements of title III"), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

promulgated regulations regarding existing facilities on cruise ships over a decade ago. Nonetheless, the district court (but not the court of appeals, Pet. App. 14a n.10) found that the lack of regulatory guidance for *new-ship construction* excused cruise lines from compliance with the regulations concerning *existing-ship* compliance. It reasoned that because the existing-ship regulations provided that the requirements for barrier removal "shall not be interpreted to exceed standards for new construction," 28 C.F.R. 36.304(g)(2) (2004), the existing ship regulations would remain too undefined to be enforceable until the new-construction standards were promulgated. Pet. App. 36a-42a.

The district court's reasoning is untenable and conflicts with the agencies' interpretations of their own regulations. DOJ and DOT have made it clear that the absence of regulations fleshing out the specific ADA obligations governing newly constructed facilities does not exempt cruise ships from the other obligations of Title III. See 28 C.F.R. pt. 36, App. B, at 677; 56 Fed. Reg. 45,584, 45,600. That regulatory determination is eminently correct, for the existing regulations already provide precisely the guidance needed to render cruise ships such as respondent's ADA-compliant. See *supra* at 12-13. The fact that one *particular* regulatory provision affecting barrier removal is not defined – namely the upper limit on regulatory requirements set by 28 C.F.R. 36.304(g)(2) – does not render the remainder of the existing-ship regulations unenforceable. Hence, although draft guidelines for newly constructed and altered ships that would set that upper bound have only recently been issued, see *supra* at 5 n.1, DOJ has long taken the position that "[p]laces of public accommodation aboard ships must comply with all of the title III requirements, *including removal of barriers to access where readily achievable*." DOJ, Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (emphasis added), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

4. Because cruise ships are "public accommodations," respondent must comply with Title III's general requirement that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment" of its "goods, services, privileges, advantages or accommodations." 42 U.S.C. 12182(a). Respondent must also comply with the more specific rules that flesh out that general prohibition, including the requirement that public accommodations "make reasonable modifications in policies, practices, and procedures" to allow people with disabilities to participate in their activities, *id.* § 12182(b)(2)(A)(ii); see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 681-82 (2001), as well as the requirement that public accommodations "remove architectural barriers, and communications barriers that are structural in nature," so long as "such removal is readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv).

The statute also prohibits discrimination against any individual because of the disability of anyone with whom that individual "is known to have a relationship or association." 42 U.S.C. 12182(b)(1)(E). Thus, respondent cannot discriminate against the companions of disabled individuals by denying those companions the full enjoyment of its facilities.

Further, because cruise ships are "specified transportation services," respondent must comply with Title III's general prohibition on disability-based discrimination "in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. 12184(a). There can be no doubt that respondent is "primarily engaged in the business of transporting people." Nor can there be any doubt that its operations – transporting people from ports in a number of states to foreign countries and back – "affect commerce." See *id.* § 12181(1) (defining "commerce" to mean, *inter alia*, "travel, trade, traffic, commerce, transportation, or communication" between states or between a state and a

territory or foreign country). The statute moreover requires providers of "specified public transportation" to "make reasonable modifications consistent with those required under" the reasonable-modification provision that applies to public accommodations, and to "remove barriers consistent with the requirements of" the barrier-removal provisions that apply to public accommodations. *Id.* § 12184(b)(2)(A), (C).

B. The Breadth of Respondent's Pervasive Discrimination Against Passengers With Disabilities Confirms That the ADA Should Apply to Respondent's Cruise Ships

Congress enacted the ADA to "allow people with disabilities to boldly go where everyone else has gone before." Arlene S. Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291, 301 (2003) (More than a decade after the ADA's enactment, however, respondent still engages in systemic discrimination against persons with disabilities and furthermore refuses to make reasonable modifications to eliminate or minimize either the effects of its discriminatory practices and policies or the physical barriers on its ships.

There is no merit to respondent's suggestion that it is somehow excused from complying with the ADA because cruise ships are "fundamentally different" from other places of public accommodation and transportation. Resp. C.A. Br. 27. Rather, as outlined below, the breadth of petitioners' claims demonstrate that respondent discriminates in ways that have nothing to do with the supposedly unique characteristics of cruise ships. And, as evidenced by the conduct of other cruise lines, respondent could comply with the ADA with little difficulty.

1. Respondent Subjects Passengers With Disabilities to Discriminatory Practices and Policies That Are Unrelated to the Physical Construction of Its Ships.

Respondent's argument that it cannot be required to comply with the ADA because its cruise ships are physically "different" from other forms of public accommodation or specified public transportation obviously carries no weight with regard to petitioners' claims that have nothing to do with the physical construction of the ship. Such practices are indefensible and are not employed by other cruise lines.

a. Respondent Discriminates Against Passengers With Disabilities Even Before Boarding.

Beginning with the first steps of the ticketing process, respondent discriminates against passengers with disabilities by requiring them to identify themselves as disabled and to disclose the nature of their disabilities, even if they do not need any special accommodations or wish to disclose such personal information. See NCL, Important Passenger Information: Guests with Special Needs, *at* http://www.ncl.com/more/special_services.htm. It also requires passengers with disabilities to obtain a physician's note indicating that they are fit for travel, NCL, Affirmation and Liability Release 3 (July 12, 1999), and – although no such requirement is imposed on passengers without disabilities – to waive NCL's liability for any damages or personal injuries resulting from either medical treatment or lack of medical treatment while on board, even if those injuries are entirely unrelated to their disabilities. *Ibid.*[3]

Respondent provides its passengers with disabilities with substantially fewer – and less desirable – options than its passengers who do not require accessible rooms. While

[3] For example, if an NCL physician failed to treat four passengers' food poisoning properly, one mobility-impaired passenger seemingly could not recover, while her companions could.

passengers without disabilities have access to a range of options – for example, penthouse suites, luxury suites, ocean-view staterooms with a balcony, deluxe ocean-view staterooms, and inside staterooms, see NCL, Accommodations, *at* http://www.cruiseweb.com/NCL-ACCOMMODATION.HTM – the few accessible cabins available on ships such as respondent's Norwegian Star and Norwegian Sea are far less desirable, interior cabins located on one deck of the ship. See NCL, Site Map (providing links to the deck plans for each of NCL's cruise ships), *at* http://www.ncl.com/sitemap.htm. Other cruise lines provide disabled passengers with a wide range of options.[4]

Respondent generally requires even fully self-sufficient passengers with disabilities to travel with a companion who does not have a disability. See Letter from Passenger Courtesy, NCL, to Douglas Spector (July 12, 1999). That policy is unlawful, because "[r]equiring a traveling companion as an eligibility criterion violates the ADA, unless the cruise line demonstrates that its policy is necessary for some compelling reason." DOJ, Title III Technical Assistance Manual III-4.1100 (1993), *available at*

[4] Petitioners traveled on either the Norwegian Star, which has approximately 800 cabins, or the Norwegian Sea, which accommodates approximately 1500-1800 passengers. J.A. 11 (Compl. ¶¶ 14, 16). Notably, all four of the allegedly accessible cabins available on both ships are interior cabins lacking both portholes and balconies. Pet. C.A. Br. 6.

By contrast, Princess Cruise Lines currently has 136 accessible rooms on ten ships and plans to have 154 more accessible rooms in its new ships by the end of 2004; its "accessible cabins are available in a variety of categories including inside, outside, balcony and mini-suites." Princess Cruises, Policy Statements: Accessibility for Passengers with Disabilities, *at* http://www.princess.com/about/policy.jsp?policyID=na405. Similarly, Carnival Cruise Lines provides a choice of accessible cabins "dispersed on different decks and placed at both exterior and interior cabins," see Exhibit 1 to Joint Motion for Conditional Class Certification, Fairness Hearing, a Stay, and Approval of Settlement, *Access Now, Inc.* v. *Cunard Line Ltd., Co.*, No. 00-7233-CIV-Moreno (S.D. Fla. 2001) [hereinafter Carnival Settlement Agreement] ¶ 2.2.

http://www.ada.gov/taman3.html. The policy is also unnecessary, as other cruise lines do not employ it. See, *e.g.*, Holland America Line, Planning & Advice: Disability Accommodations (traveling companions required only for "[g]uests who are unable to care for their basic needs (e.g. dressing, eating and attending safety drills)"), *at* http://www.hollandamerica.com/guests/category.do?category=disability&topic=disability.[5]

Respondent requires passengers with disabilities to pay a premium to ensure that they have an accessible cabin.[6] Indeed, even the disabled passengers' mandatory traveling companions must pay the premium for an accessible cabin – for which they have no need. For example, petitioners Douglas and Ana Spector paid nine hundred dollars more for their accessible cabin than their non-disabled relatives paid for nicer cabins on the same cruise. See *Eye on America: The Courts*, (CBS News broadcast, Oct. 26, 2004); *Supreme Court To Hear Cruise Case*, NEW MOBILITY MAG., Nov. 2004; *available at* http://www.newmobility.com/review_article.cfm?id=938&action=browse.[7] This policy effectively

[5] Although NCL agreed in another ADA suit brought by the government to discontinue its companion requirement for passengers with visual impairments, it maintains the companion requirement for passengers with other disabilities. See *United States* v. *Norwegian Cruise Lines, Ltd.*, No. 01-0244-CIV-King/O'Sullivan (S.D. Fla. Aug. 22, 2001) (Consent Order ¶ 17.1(1)), *available at* http://www.usdoj.gov/crt/ada/ncruise.htm; see also DOJ, *Norwegian Cruise Line Agrees With Justice Department To Keep Its Ships Open to Blind Persons* (Sept. 10, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/September/456cr.htm.

[6] When passengers with disabilities and/or their traveling companions complained about paying more for "accessible cabins" than passengers without disabilities paid for similar or better cabins, NCL contended that its unfair pricing scheme was allowed because it was not subject to the ADA. See J.A. 12-13 (Compl. ¶ 20); *Eye on America: The Courts* (CBS News broadcast, Oct. 26, 2004).

[7] Persons with disabilities pay higher prices because respondent makes very few accessible cabins available. As a consequence, persons with disabilities are regularly unable to secure so-called "run of the ship" discounts available to other passengers.

places an unlawful surcharge on tickets sold in the U.S. for cruises on vessels sailing to and from U.S. ports. See 42 U.S.C. 12182(b)(1)(A)(ii) (making it unlawful "to afford an individual or class of individuals, on the basis of a disability or disabilities * * * the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals"); 28 C.F.R. 36.301(c) (2004) (prohibiting the assessment of surcharges on persons with disabilities to fund a public accommodation's compliance with Title III); DOJ, Title III Technical Assistance Manual at III-4.1400 (1993) ("Although compliance may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."), *available at* http://www.ada.gov/taman3.html; see also J.A. 11-15 (Compl. ¶¶ 14, 32).

Even if a would-be passenger with a disability complies with all of the additional requirements imposed by respondent, NCL still reserves the right to exclude her from traveling – including for subjective and offensive reasons, such as the possibility that she "may endanger the * * * *comfort* of other guests." See NCL, Important Passenger Info.: *Guests with Special Needs* (emphasis added), *at* http://www.ncl.com/more/special_services.htm; J.A. 12 (Compl. ¶ 19). This is conduct based on nothing more than unwarranted fears and stereotypes and is prohibited by the ADA. See, *e.g.*, H.R. Rep. No. 101-485, pt. 2, at 30 (1990) (describing, as paradigmatic cases of discrimination that would be prohibited by the ADA, instances in which a child with cerebral palsy was excluded from school because a teacher claimed that "his physical appearance 'produced a nauseating effect' on his classmates").

To prevent such discrimination, Title III allows exclusion of an individual with a disability *only* if the individual "poses a direct threat to the health or safety of others." 42 U.S.C. 12182(b)(3). That demanding standard is met only when an

individual with a disability poses a significant safety risk that cannot be eliminated by a "modification of policies, practices, or procedures or by the provision of auxiliary aids or services," as confirmed by "medical or other objective evidence," *Bragdon* v. *Abbott*, 524 U.S. 624, 648-49 (1998) (citing 42 U.S.C. 12182(b)(3)).

b. Once On Board, Respondent Continues to Discriminate Against Passengers With Disabilities and Their Companions.

Respondent continues its pattern of discrimination while passengers with disabilities check in and board the ship. For example, respondent does not provide accessible restrooms during the long delays that often accompany boarding. Nor does respondent permit the simple accommodation of early boarding, unlike other cruise lines. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000SiRwMEAk20qKYe6qTTP1VgQ:v2mocb1m. Early boarding is a readily achievable practice that NCL extends to other passengers, such as members of its "frequent cruisers" club. See NCL, Cruise News (Aug. 8, 1999) (newsletter distributed to passengers aboard NCL cruise ships).

On board, respondent imposes various other discriminatory policies. For example, the decks on which respondent's safety evacuation drills occur are not accessible. See J.A. 12 (Compl. ¶ 19). Although passengers with mobility impairments are thus effectively excluded from these important events – which, on petitioners' cruises, took place even before the ship left the Port of Houston, see generally, *e.g.*, NCL, Cruise News: M/S Norwegian Sea (Aug. 1, 1999) (newsletter distributed to passengers aboard the M/S Norwegian Sea) – respondent does not conduct any alternative drills for these passengers, nor does it provide them with any plan regarding how they will be evacuated in the event of an emergency. Rather, the only "safety"

accommodation that respondent provides to passengers with disabilities is to discriminate by requiring them to bring a traveling companion. See NCL, Release Form (release form signed by Douglas Spector on July 12, 1999) ("In order to assure your safety during the cruise, we request that you travel with an individual who is not mobility impaired. This person should be able to provide assistance in the unlikely event of an emergency aboard the ship.").

By contrast, other cruise lines sailing to and from U.S. ports have recognized the importance of both maintaining and communicating safety evacuation plans for passengers with disabilities. See, *e.g.*, Princess Cruises, Policy Statements: Accessibility for Passengers with Disabilities, *at* http://www.princess.com/about/policy.jsp?policyID=na405; Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B.

2. Respondent Also Discriminates Against Persons With Disabilities Through Barriers to Access.

The final category of ADA violations involves the barriers to access that respondent refuses to remove or minimize through reasonable modifications. See 42 U.S.C. 12182(b)(2)(A)(iv) (requiring removal of "architectural barriers" in existing facilities "where such removal is readily achievable"); *id.* § 12182(b)(2)(A)(v) (requiring "alternative methods" of access if barrier removal is not "readily achievable"). Cruise ships are essentially floating hotels that, like large hotels on land, contain a variety of facilities: rooms, restaurants, theaters, and retail stores. See *Stevens*, 215 F.3d at 1241. Equivalent facilities on land must comply with the ADA, and there is no reason why cruise ships should not; removal of most barriers aboard would not require structural changes that could affect the safety and stability of the vessel. As the Eleventh Circuit noted in *Stevens*, "a restaurant aboard a ship is still a restaurant." *Ibid.*

For example, on the ships on which petitioners sailed, none of the public restrooms were accessible to passengers

with mobility impairments, thereby requiring the disabled petitioners to return to their cabins whenever they needed to use the restroom. Because the Norwegian Star, on which several petitioners sailed, is 710 feet long and has nine guest decks, see NCL, Norwegian Star Deck Plans, *at* http://www.ncl.com/fleet/06/deckplans.htm, trips to use the restroom in the accessible cabins can necessarily be lengthy ones, particularly for passengers with mobility impairments.[8] In many cases, however, the public restrooms could be rendered accessible merely by changing the direction in which the doors to the toilet stalls swing. Other cruise lines provide accessible public restrooms. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at II; Princess Cruises, Policy Statements: Accessibility for Passengers With Disabilities, at http://www.princess.com/about/policy.jsp?policyId=na405.

Passengers with mobility impairments who travel on respondent's cruise ships are also frequently unable to use any swimming pool or Jacuzzi spa because those facilities lack the hydraulic lifts that would make them accessible. Such lifts are routinely provided by other cruise lines. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000W9rfkWlP2Fh_0NLeuz6YbqU:v29bc620.

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[8] It frequently took passengers using wheelchairs and scooters on the Norwegian Sea between forty-five minutes to and three hours to travel back to their cabins to use the restrooms, leading to many physically uncomfortable and embarrassing situations. Dylan Otto Krider, *Access Denied. Once the Handicapped Come Aboard Norwegian Cruise Lines, They May Never Leave No Matter How Badly They Want To*, HOUSTON PRESS, Nov. 15, 2001, *available at* http://www.houstonpress.com/issues/2001-11-15/news/news2_print.html; John T. Fakler, *Accessibility Suit Targets Norwegian Cruise Lines*, SO. FLA. BUS. J., Dec. 7, 2001, *available at* http://www.bizjournals.com/southflorida/stories/2001/12/10/story2.html.

Coamings – the raised edges around a ship's doors – render many doorways inaccessible to passengers with mobility impairments, and in particular to those who must use wheelchairs or scooters. Many of the inaccessible doorways could be made accessible without reducing the ship's seaworthiness by eliminating or ramping the coamings, as is obvious from the practices of other cruise lines. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.A; Princess Cruises, Policy Statements: Accessibility for Passengers With Disabilities, *at* http://www.princess.com/about/policy.jsp?policyId=na405.

To the extent that the doorways cannot be made accessible, respondent could – but has chosen not to – mitigate the problem by providing disabled passengers with deck plans showing alternate routes of travel, just as other cruise lines have done. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000W9rfkWlP2Fh_0NLeuz6YbqU:v29bc620; Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B.[9]

* * * *

At virtually every step of the cruising experience, respondent imposes discriminatory policies and practices and physical barriers that are unlawful under the ADA. Although other cruise lines have taken steps to ensure that their programs and ships are accessible, respondent refuses. This

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[9] The Carnival settlement agreement makes clear that numerous other adjustments to make cruise ships more accessible can be reasonably undertaken. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B, I.K, IV.D, I.J, & I.E (agreeing to make stairs more accessible to passengers with visual impairments by lowering the handrails and blocking the open spaces behind the steps, and to make ship more accessible to passengers with mobility impairments by, for example, "lower[ing] at least one phone at each phone bank location," "provid[ing] accessible fountains * * * or * * * cup dispensers," "lower[ing] all pull stations to be within the range of reach," and providing lower elevator controls for at least one elevator per bank).

is precisely the type of discrimination that the ADA was designed to address. It is thus clear that Title III of the ADA has an essential role to play in ensuring that respondent's services and facilities are accessible to passengers with disabilities. For the reasons outlined below, Title III clearly applies to respondent and its foreign-flagged ships.

II. THE ADA SPECIFICALLY APPLIES TO FOREIGN-FLAGGED SHIPS OPERATING IN U.S. TERRITORY.

The regulatory agencies charged by Congress with implementing the ADA have determined that foreign-flagged cruise ships are subject to Title III. DOJ has stated that foreign-flagged cruise ships "that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement." See DOJ, Title III Technical Assistance Manual III-1.2000(d) (1994 Supp.), *available at* http://www.usdoj.gov/crt/ada/taman3up.html. In furtherance of that determination, it has brought a Title III enforcement action (ultimately resulting in a consent decree) against respondent for its treatment of blind passengers on its foreign-flagged ships. See *United States* v. *Norwegian Cruise Lines Ltd.*, No. 01-0244-CIV-King/O'Sullivan (S.D. Fla. Aug. 22, 2001), *available at* http://www.usdoj.gov/crt/ada/ncruise.htm. For its part, DOT explicitly concluded in its regulatory preamble that foreign-flagged cruise ships were covered by the statute: "Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations.* * * The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports." 56 Fed. Reg. 45,584, 45,600.

For the reasons that follow, that regulatory determination is sound. The Fifth Circuit erred in holding that, because Title III of the ADA contains no express statement that it

applies to foreign-flagged ships, the statute does not protect Americans in U.S. territory. In fact, this Court's precedents establish that U.S. law presumptively applies to foreign-flagged vessels in U.S. ports and waters except when the statute in question is directed at the relationship between the vessel and a foreign crew. Indeed, even if this Court were to apply the case law involving ships' crews, petitioners prevail. Those cases establish a maritime choice-of-law test that, given the overwhelming nexus between respondent's operations and the United States, dictates that Title III applies in U.S. territory. The case law cited by the court of appeals involving the narrow and distinct question of the labor rights of the crew compels the same conclusion, for those cases hold that U.S. law applies to protect crew members who are U.S. citizens even when it does not protect foreign crew members.

A. Both the Plain Text and Congress's Express Purpose in Enacting the ADA Establish That the Statute Applies to Foreign-Flagged Cruise Ships.

1. The Fifth Circuit applied a presumption – surmountable only by a plain statement of congressional intent – that U.S. law does not apply to protect U.S. citizens on foreign-flagged ships operating in U.S. territory. Pet. App. 7a-8a. In fact, this Court's precedents dictate the opposite presumption: absent some expression of congressional intent, U.S. law applies to conduct on a foreign-flagged ship that occurs within U.S. territory and that principally affects U.S. citizens rather than a foreign crew.

Preliminarily, it is settled as a matter of international law that (within limits related to the right of "innocent passage" that this case does not implicate) a sovereign's authority extends completely to conduct in its ports and territorial waters, including conduct aboard foreign-flagged ships. Restatement (Third) of Foreign Relations § 512 (1987) ("Subject to § 513 [guaranteeing the right of free passage], the coastal state has the same sovereignty over its territorial sea * * * as it has in respect of its land territory."); *id.* § 513.

The coastal state is "entitled to enforce its laws against the ship and those on board" as soon as the ship enters the internal waters or ports of that state. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 54 (1988); see also Restatement (Third) § 512 note 5 ("Once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state.").[10]

As a consequence, "[a] coastal state can condition the entry of foreign ships into its ports on compliance with specified laws and regulations." Restatement (Third) § 512 note 3; see also *id.* § 511 cmt. e ("A state also has complete sovereignty over its seaports."). Because the United States maintains full territorial sovereignty over its internal waters, "there is no right of innocent passage through internal waters such as exists through the territorial sea." CHURCHILL & LOWE, *supra*, at 51. Notably, only in cases of innocent passage is the coastal state prohibited from applying domestic "laws and regulations" to a foreign ship's "design, construction, manning or equipment." United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 21(2), 21 I.L.M. 1261, 1274. See also *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, ch. II, § 18 (Hilliard, Gray & Co., 1834) ("Every nation possesses an exclusive sovereignty and jurisdiction within its own territory.").[11]

[10] In *United States* v. *Louisiana*, 394 U.S. 11 (1969), this Court explained:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

Id. at 22-23 (footnotes omitted). "Inland waters" include "all ports, estuaries, harbors, bays, channels, straits, historic bays, sounds, and also all other bodies of water which join the open sea." *Id.* at 40 n.45 (quoting H.R. Rep. No. 83-215, at 4 (1953)).

For centuries, this Court has presumed that, in U.S. statutes, Congress *exercises* its sovereign authority over foreign-flagged vessels in U.S. territory, at least insofar as conduct aboard the vessel affects Americans rather than the vessel's foreign crew. The classic statement of the principle was announced by Chief Justice Marshall in *The Schooner Exchange* v. *McFaddon* (*The Exchange*), 11 U.S. (7 Cranch) 116, 144 (1812):

> [W]hen merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits.

In *Mali* v. *Keeper of the Common Jail of Hudson County, N.Y.*, 120 U.S. 1 (1887), the Court invoked the principle of

[11] Although the United States has not yet ratified the Convention, the U.S. recognizes that the Convention reflects customary international law to which it adheres. See President's Statement on United States Ocean Policy, 1983 PUB. PAPERS OF PRESIDENT RONALD REAGAN 378 (Mar. 10, 1983). On March 11, 2004, the Senate Committee on Foreign Relations unanimously recommended that the full Senate ratify the Convention pursuant to suggested declarations and understandings. See Sen. Comm. on Foreign Relations, 108th Cong., Report on United Nations Convention on the Law of the Sea 6 (Comm. Print Mar. 11, 2004) (Exec. Rpt. 108-10).

The Exchange to hold that New Jersey law applied even to the murder of one foreign crew member by another on a foreign-flagged ship in U.S. territory, despite the lack of any specific statement of legislative intent. See *id.* at 12 ("As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."). In applying the principle that U.S. law applies in U.S. territory to conduct affecting Americans, the Court distinguished activities on foreign-flagged ships that affected Americans from those that involved only the vessel and its crew:

> The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction.

Id. at 18.

Subsequently, *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U.S. 100 (1923), also invoking *The Exchange*, held that the Prohibition-era Volstead Act prohibited foreign-flagged steamships from carrying or serving alcohol in U.S. waters despite the absence of an express statement of purpose regarding such vessels. "A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them." *Id.* at 124. Indeed, the Court found the Act's silence to be evidence in *favor* of applicability: After recognizing that the Act outlawed alcohol in "'all territory subject to [U.S.] jurisdiction,'" the Court

went on to note that "[t]here is in the act no provision * * * making it inapplicable to merchant ships, either domestic *or foreign*, when within [U.S.] waters, save in the Panama Canal." *Id.* at 127 (emphasis added). "Such an exception would tend to embarrass its enforcement and to defeat the attainment of [the Eighteenth Amendment's] obvious purpose, and therefore cannot reasonably be regarded as implied." *Id.* at 126.

In *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), this Court unanimously held – in an opinion by Justice Holmes – that the Jones Act applied to the death of a U.S. citizen on a German vessel flying the German flag in a U.S. port, despite the absence of an express statement in the Act that it applied to foreign-flagged vessels. Invoking *The Exchange* once again, the Court explained: "It is *always* the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad." *Id.* at 240 (citations omitted) (emphasis added). The Court thus saw "no reason for limiting the liability for torts committed [aboard a German vessel] when they go beyond the scope of discipline and private matters that do not interest the territorial power." *Ibid.*[12]

In *International Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), this Court unanimously held that the National Labor Relations Act applied to a dispute over picketing regarding the working conditions paid both to Americans and foreign crewmembers performing longshore work for foreign-flagged cruise ships in U.S. ports despite any express statement of congressional intent. See *id.*

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[12] Although *Uravic* was subsequently overruled on statutory grounds, its rationale regarding Congress's exercise of its sovereign authority remains unaffected. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 348 (1991).

at 200. The Court explained that "this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work." *Id.* at 199; see also *id.* at 201 (White, J., concurring) (agreeing with majority in relevant part).

2. The Fifth Circuit's requirement of a plain statement as a prerequisite to any application of U.S. law to foreign-flagged vessels is thus contrary to this Court's precedent. Indeed, this Court has recognized that flags of convenience are an artifice to evade U.S. law that carry little if any genuine element of sovereignty. It has refused to blind itself to the fact that "a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries," a practice that has naturally led U.S. courts to look "beyond the formalities of more or less nominal foreign registration" in enforcing U.S. law against foreign-flagged ships. *Lauritzen* v. *Larsen*, 345 U.S. 571, 587 (1953).

The Court has concluded that "the *façade*" of foreign registry "must be considered as minor, compared with the *real* nature of the operation and a cold objective look at the *actual* operational contacts that [the] ship and [its] owner have with the United States." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970) (emphases added). A contrary rule would allow the facile circumvention of U.S. law and give "an advantage over citizens engaged in the same business by allowing [the foreign-flagged vessel's owner] to escape the obligations and responsibility" imposed by our statutes. *Ibid.*

3. Neither respondent nor the court of appeals has been able to produce any evidence that Congress intended to restrict the ADA's presumptive scope; indeed, they have failed even to articulate a genuine *reason* that Congress would have intended to exempt respondent from the disabilities laws. To the contrary, there is every indication that Congress intended Title III of the ADA to apply in these

circumstances. Indeed, the statute is sufficiently clear that, even if applicable, the presumption that the Fifth Circuit erroneously erected is overcome.

In enacting the ADA, Congress "invoke[d] the sweep of congressional authority, * * * including the power * * * to regulate commerce." 42 U.S.C. 12101(b)(4). Title III expressly defines the "commerce" it regulates to include "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country." *Id.* § 12181(1)(B), (C). The activities of cruise ships – whether U.S.- or foreign-flagged – fall squarely within this invocation of congressional authority.[13]

Further, in light of the dearth of U.S.-flagged cruise ships, the fact that the text of Title III demonstrates Congress's intent to apply the statute to cruise ships means that Congress would *ipso facto* have intended it to apply to *foreign-flagged* cruise ships operating in U.S. waters. When the ADA was passed in 1990, seventy-five of the seventy-seven cruise ships servicing U.S. ports were foreign-flagged. See H.R. Rep. No. 102-357, at 2 (1991). Between 2001 and June 2004, *no* cruise ship flew the U.S. flag. Mary Lu Abbott, *Pride of Aloha Slowly Living Up to Its Name*, CHI. TRIB., Nov. 21, 2004, at 14; Iver Peterson, *Leading Passengers to Water*, N.Y. TIMES, Sept. 28, 2003, § 5, at 8. Respondent's *Pride of Aloha*, which launched in June 2004, is currently the only U.S.-flagged cruise ship. Thus, a contrary interpretation of Title III, which was intended to be "the most sweeping piece of civil rights legislation since the Civil War

[13] As this Court noted in finding that Title II applies to state prisons, even if it could be concluded that Congress did not explicitly consider Title III's application to foreign-flagged ships, the statute's sweeping prohibition against discrimination "does not demonstrate ambiguity. It demonstrates breadth." *Pa. State Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)). Accord *Stevens*, 215 F.3d at 1241 (noting that "a statute is not vague or ambiguous just because it is broad").

era." 135 Cong. Rec. at S10,714, would effectively render its protection for persons with disabilities aboard cruise ships meaningless. Congress could not possibly have intended such an ineffectual result when it set out "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2).

It also would have made no sense for Congress to permit the protections afforded U.S. citizens to turn on the formalism of a ship's registry. For example, while the ships on which petitioners sailed were registered in the Bahamas, respondent's ships are flagged in four different nations. Congress could not have intended the rights of respondent's similarly situated U.S. passengers to turn solely upon which particular ship within the company's fleet they board in a U.S. port.[14]

Under this Court's precedents establishing a presumption that U.S. laws apply to conduct affecting U.S. citizens in U.S. territory, even on foreign-flagged vessels, there is accordingly no basis to conclude that Congress intended to exclude foreign-flagged cruise ships from the reach of Title III of the ADA.

B. Title III of the ADA Applies to Respondent's Operations Even Under Precedents Governing the Application of U.S. Law to the Crew of Foreign-Flagged Vessels.

The Fifth Circuit in this case did not follow this Court's decisions applying U.S. law to the conduct of foreign-flagged vessels in U.S. territory affecting *U.S. citizens* (see *supra* Part II.A) but instead looked to decisions addressing the application of U.S. law to the vessel's *foreign crew*. The court of appeals misapplied even those precedents, however.

[14] Nor could Congress have intended to defer to other nations' disability laws, because when the ADA was passed in 1990, no other flagging nation had implemented a disability non-discrimination law. See Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 app. A (2002).

To the extent those cases are relevant at all, they actually dictate that Title III of the ADA applies to respondent's conduct, given the overwhelming nexus between its operations and the United States.

The most analogous cases among those that deal with crewmembers are those addressing whether the Jones Act – which then provided recovery for "[a]ny seaman who shall suffer personal injury in the course of his employment," see *Rhoditis*, 398 U.S. at 307 n.1[15] – applied to injuries sustained by seamen aboard foreign vessels. As discussed above, when the injured party was a U.S. citizen, the Court concluded without hesitation that U.S. law applied in a case under the related provisions of the Jones Act. See *supra* at 29-30 (discussing *Uravic*, 282 U.S. 234). But even in cases involving *foreign* plaintiffs, the Court has applied a balancing test that can result in the application of U.S. law. The balancing test is not limited to Jones Act cases, but is instead "intended to guide courts in the application of maritime law generally." *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959).

The Court has identified eight factors to consider in a maritime choice-of-law case: (1) the place of the wrongful act, (2) the law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, (6) inaccessibility of a foreign forum, (7) the law of the forum, and (8) the shipowner's base of operations. *Rhoditis*, 398 U.S. at 309; *Lauritzen*, 345 U.S. at 583-92.

Six of these factors – the first, third, fifth, sixth, seventh, and eighth – unquestionably favor petitioners. The events giving rise to petitioners' claims actually took place in U.S. territory. As detailed above, petitioners were subjected to myriad discriminatory policies and practices long before they ever boarded respondent's cruise ships, and their remaining claims arise out of events that occurred in U.S. waters –

[15] The Jones Act was subsequently amended to restrict such actions. See 46 U.S.C. App. 688(b) (amended 1982).

principally internal waters, including the Port of Houston and the Houston Ship Channel. See *supra* Part I.B. The victims of respondent's discrimination are U.S. residents. See J.A. 9.

Petitioners and respondent formed their respective contracts – that is, petitioners' tickets – within the United States. By respondent's own design, these contracts are to be governed "in all respects" by U.S. law. J.A. 19, (Compl. ¶ 28). And the contract further requires that "any and all claims, disputes or controversies * * * arising from or in connections with" it must be brought in Dade County, Florida, thereby *precluding* petitioners from seeking relief in any foreign forum. *Ibid.* Moreover, petitioners brought their claims in a U.S. forum. Finally, respondent has its base of operations in Miami, Florida. See J.A. 10. Respondent promotes its headquarters in Miami, where its public relations, employee recruitment, hiring, benefits, and human resources departments are centered.

The remaining two factors – the ship's foreign registry and the company's foreign incorporation – are not significant in light of this overwhelming U.S. nexus. In *Rhoditis*, this Court held that the Jones Act applied to an injury sustained by a Greek citizen – who had been retained under a Greek contract with a Greek choice-of-law clause on a Greek-flagged ship owned by a company incorporated in Greece – that could have been redressed in a Greek forum. 398 U.S. at 310. The Court found the Greek contacts to be "minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." *Ibid.* (noting that the injury occurred in this country, that the defendant had its principal place of business in the United States and engaged in significant U.S. commerce, and that the suit was brought in a U.S. forum). *Ibid.* The Court cautioned that "[t]he significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction," *id.* at 309, and concluded that the "liberal purposes of the Jones Act" dictate that "the façade of the operation must be

considered as minor, compared with * * * the actual operational contacts * * * with the United States. *Id.* at 310.

This case involves a closer U.S. nexus than that presented by *Rhoditis*, one that encompasses all the factors the Court found dispositive there. And the "liberal purposes' of the ADA demand, if anything, an even *broader* construction than do those of the Jones Act. See *supra* Part I (discussing the ADA's broad sweep). *A fortiori*, then, application of the same balancing test means that Title III applies to respondent's operations.[16]

C. The Precedents on Which the Fifth Circuit Relied Involve the Application of U.S. Labor Law to Foreign Vessel Crews and Are Inapposite.

The Fifth Circuit derived its contrary plain-statement requirement from cases addressing the application of U.S.

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[16] In *EEOC* v. *Kloster Cruise, Ltd.*, 939 F.2d 920 (CA11 1991), the Eleventh Circuit relied on the Jones Act cases to reject a cruise line's argument that its ships' foreign flags precluded the EEOC from enforcing an administrative subpoena to investigate allegations of employment discrimination by the cruise line. The court of appeals employed the *Lauritzen* balancing test rather than *Benz/McCulloch* "plain statement" requirement, explaining that the "violations alleged in the instant case are sufficiently similar to Jones Act torts and sufficiently dissimilar to the pervasive regulation of the National Labor Relations Board involved in *McCulloch* such that we cannot conclude at this early stage that the EEOC clearly lacks jurisdiction." *Id.* at 924. The court of appeals further noted that "even if the 'law of the flag' were dispositive" with regard to activities that occurred on the cruise line's ships, discovery would nonetheless be appropriate insofar as it could establish "that part of the activities of the employees occurred in Kloster's main offices in downtown Miami or elsewhere in the United States and not aboard the foreign flag vessel." *Id.* at 923 n.4; see also *Rainbow Line, Inc.* v. *MV Tequila*, 480 F.2d 1024 (CA2 1973) (applying *Lauritzen* factors to find that U.S. law applied to a contractually derived maritime lien on a foreign-flagged vessel when overwhelming U.S. contacts outweighed the foreign registration and ownership); *EEOC* v. *Bermuda Star Line, Inc.*, 744 F. Supp. 1109 (M.D. Fla. 1990) (applying *Lauritzen* factors to find Title VII applicable when the captain of a Panamanian vessel refused to hire a female seaman).

labor law to foreign-flagged vessels that happen to visit this country. See Pet. App. 4a-5a (citing *Benz*, 353 U.S. 138 and *McCulloch*, 372 U.S. 10). That issue is obviously very far afield from the question whether U.S. disability law protects American passengers in U.S. territory.

The critical fact in the maritime labor cases is not the vessel's foreign flag (see *supra* at 31) but rather that the application of U.S. labor statutes would directly interfere with the administration of the foreign vessel's relationship with its crew and create a conflict between U.S. and foreign labor law. The plaintiffs in the cases on which the court of appeals relied sought directly to confer labor rights on a foreign crew wherever the ship sailed. This Court refused to extend American labor law so far as to protect the interests of foreign seamen absent a further clear statement of congressional intent, reasoning that the statutes embody a "bill of rights * * * for *American* workingmen and for their employers." *Benz*, 353 U.S. at 144 (emphasis in original).

Contrary to the Fifth Circuit's ruling, the labor cases do not establish a plain-statement requirement for the more general application of U.S. law to foreign-flagged vessels. Indeed, the Court has expressly declined to extend the rule of these cases even to Jones Act cases involving injuries to foreign employees, distinguishing the latter context as one in which "the pervasive regulation of the internal order of a ship may not be present." *McCulloch*, 372 U.S. at 19 n.9; see also *Uravic*, 282 U.S. at 240 (distinguishing the tort action at issue from "discipline and private matters that do not interest the territorial power").

Even within the labor context, "*Benz* and its successor cases have *not* been read to exempt all organizational activities from the [NLRA's] protections merely because those activities in some way were directed at an employer who was the owner of a foreign-flag vessel docked in an American port." *Windward Shipping (London) Ltd.* v. *American Radio Ass'n, AFL-CIO*, 415 U.S. 104, 112 (1974)

(emphasis added). Thus, *Ariadne Shipping Co.* held that the Act applied to a picket protesting the wages paid to Americans engaging in longshore work on a foreign cruise ship. See *supra* at 30-31. The U.S. longshoremen in *Ariadne*, the Court explained, "were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work" and were not "involved in any internal affairs of either ship which would be governed by foreign law." 397 U.S. at 199. Such a "short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order,'" and the application of U.S. law "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." *Ibid.*

The Court in *Ariadne* accordingly distinguished the very cases on which the Fifth Circuit relied here:

> In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable conditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. In *McCulloch* an American seamen's union petitioned for a representation election among the foreign crew members of a Honduran-flag vessel who were already represented by a Honduran union, certified under Honduran labor law.

397 U.S. at 198. The Court explained that the plain-statement requirement applicable in that distinct and narrow context was directly tethered to the prospect that application of U.S. labor law would generate conflicts of international law and interfere with the administration of the ship's crew, conflicts that were not implicated when U.S. law was instead invoked to protect Americans:

> In [*Benz* and *McCullough*], we concluded that, since the Act primarily concerns strife between American

> employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews. Thus we could not find such an intention by implication, particularly since to do so would thrust the National Labor Relations Board into "a delicate field of international relations." Assertion of jurisdiction by the Board over labor relations already governed by foreign law might well provoke "vigorous protests from foreign governments and * * * international problems for our Government" and "invite retaliatory action from other nations."

Id. at 198-99 (internal citations omitted; second alteration in original).

To the extent maritime labor precedents are relevant at all, this case is much closer to *Ariadne* than to *Benz* and *McCullough*. Just as the NLRA is a "bill of rights * * * for American workingmen and for their employers," *Benz*, 353 U.S. at 144, that this Court held fully applicable to the claims of American longshoremen in *Ariadne*, so too the ADA is our nation's bill of rights for Americans with disabilities. Petitioners argue for the application of that law in the territory of this country, not the world over. Their Title III claims are based on the rights of passengers, who have a "short-term, irregular and casual," *Ariadne*, 397 U.S. at 199, relationship with respondent's vessels. See also Draft Passenger Vessel Accessibility Guidelines and Supplementary Information V201.1, *available at* http://www.access-board.gov/pvaac/guidelines.htm (regulations apply to passenger areas).[17] Thus, there is no reason why the narrow rule of comity underlying the *Benz* cases should interfere with the ADA's "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

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[17] By contrast, Title I of the ADA – which is not at issue in this case – governs the rights of disabled *employees*. 42 U.S.C. 12111-12117.

D. There Is No Conflict With SOLAS, Nor With Any Principle of International Law, That Would Justify Exempting Foreign-Flagged Ships From the ADA.

1. The Fifth Circuit erred in concluding that application of the ADA to foreign-flagged ships would give rise to international discord because of conflicts with the International Convention for the Safety of Life at Sea (SOLAS). As discussed *supra* at 26-28, the settled rule under international law is that vessels within U.S. internal waters, as well as within U.S. territorial waters (subject to some limits grounded in the right of "innocent passage"), are as fully subject to domestic law as would be an equivalent facility on U.S. land. Federal and state law are thus quite frequently and without incident applied to the operations of cruise ships doing business in the United States. See, *e.g.*, *Silivanch* v. *Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001), *aff'd*, 333 F.3d 355 (CA2 2003) (dismissing a cruise line's appeal of a mass tort verdict finding it liable for negligence when its whirlpools caused passengers to contract Legionnaire's Disease); *Gibbs* ex rel. *Gibbs* v. *Carnival Cruise Lines*, 314 F.3d 125, 128 (CA3 2002) (Becker, C.J.) (finding that federal maritime law applied to injuries to a minor aboard a cruise ship, and noting Carnival's concession of that fact); *Benson* v. *Norwegian Cruise Line Ltd.*, 859 So. 2d 1213 (Fla. Dist. Ct. App. 2004) (allowing a wrongful death suit alleged act of medical malpractice took place in Florida's territorial waters).

Respondent has moreover *voluntarily* consented to the application of U.S. law by including a U.S. choice-of-law clause in its ticket contract. J.A. 19, ¶ 28. Such clauses are ubiquitous in the cruise industry. See Curtis E. Pew, *Book Review:* Cruise Ships (Volume 10 of Benedict on Admiralty), 12 U.S.F. MAR. L.J. 389, 390 (2000) (noting that choice-of-law and choice-of-forum clauses "have virtually come to define cruise ship litigation"). Notably, respondent nowhere in its contract suggests to individuals that there is *one* U.S.

law – Title III of the ADA – that for some reason does not apply.

Nor does the prospect that different legal regimes will apply in foreign waters prevent the application of U.S. law while the ship is in U.S. territory. After all, the petitioner ships in *Cunard* traveled to foreign ports where the on-board transport and/or sale of intoxicating liquors was expressly *required*. *Cunard*, 262 U.S. at 119. Nevertheless, this Court held that the Volstead Act prohibited these activities while the ships were in U.S. waters. *Id.* at 127-31.

2. The court of appeals' conclusion regarding potential international discord was principally based on the possibility of conflicts between the requirements of Title III and this nation's obligations under SOLAS. That conclusion lacks merit. Because SOLAS applies equally to U.S.- and foreign-flagged ships, the logical consequence of the court of appeals' reasoning is that *all* cruise ships are exempt from the ADA, a result that Congress plainly did not intend. See *supra* Part I.A.

Moreover, because an act of Congress such as the ADA enjoys full constitutional parity with a treaty,[18] it must be given effect unless it is fully irreconcilable with a treaty: "when there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted); see also *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting same); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936); *Frost* v. *Wenie*, 157 U.S. 46, 58 (1895).

The Fifth Circuit erred in concluding that the only way to reconcile ADA Title III with SOLAS is to hold Title III wholly inapplicable to foreign-flagged ships. In fact, even

[18] See, *e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 18 n.34 (1957) (quoting *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution a treaty is placed on the same footing, and made like an obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.")).

accepting the flawed premise that some of Title III's requirements *do* conflict with those of SOLAS, a more nuanced approach would give far fuller effect to the language and purposes of both enactments. Title III's requirements apply *only when they do not conflict* with the treaty, as is indisputably the case with the great majority of petitioners' claims – for instance, those dealing with respondent's discriminatory pricing policy. There is a textual basis for this distinction, which has been adopted by DOJ and DOT: the provision that barriers to access must be removed only when removal is "readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv); see also *id.* § 12181(9). This Court need only interpret that phrase to exclude modifications that would violate international law, and any conflict with SOLAS would be eliminated.[19] This analysis will not be substantially different than that which federal district courts perform in every Title III barrier removal case. See, *e.g.*, *Ass'n for Disabled Americans, Inc.* v. *Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1365-69 (S.D. Fla. 2001) (evaluating facts and concluding that some, but not all, proposed modifications were readily achievable); *Parr* v. *L&L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1088-89 (D. Haw. 2000) (same).

The court of appeals, however, rejected the notion that "courts can choose to enforce those aspects of Title III that do not conflict with international law." Pet. App. 11a. Its reasoning misread this Court's precedent. This Court has repeatedly held that a single statute applies to foreign-flagged ships in some circumstances but not others. For example, the

[19] DOJ, Title III Technical Assistance Manual III-1.2000(d) (1994 Supp.) (DOJ interpretation) (foreign-flagged ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement"), *available at* http://www.usdoj.gov/crt/ada/taman3up.html; 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (DOT interpretation) (the United States "appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports" except to the extent that enforcing the ADA requirements would conflict with a treaty).

Court held that the Jones Act was applicable under the circumstances of *Rhoditis* but not in *Lauritzen* and that the NLRA was applicable in *Ariadne* but not in the other cases in the *Benz* line. See *supra* Part II.A.

3. Nor, in any event, is there actually a conflict between Title III and SOLAS even if all of Title III's requirements are applied in full. SOLAS simply establishes minimum safety standards for the construction, equipment, and operation of ships that weigh more than five hundred tons and are engaged in international passage. See generally SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001); see also Allen, *supra*, at 578.[20] Nothing in the plain language of SOLAS prevents signatory nations from imposing accessibility requirements on ships that enter their ports.

As an initial matter, many of respondent's Title III violations can be remedied without implicating any physical changes to the ship, much less SOLAS. These include respondent's surcharge for accessible cabins, its exclusion of disabled passengers from emergency evacuation programs,[21] its requirement that all passengers with disabilities be

[20] Flagging states are responsible for ensuring that ships registered under their flags have met all SOLAS requirements, and port states are permitted to inspect foreign-flagged ships for SOLAS compliance. SOLAS: CONSOLIDATED EDITION 2001, at 17-36 (Int'l Mar. Org. ed., 2001); see also Nat'l Ocean Serv., Int'l Program Office, International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974, at http://international.nos.noaa.gov/conv/solas.html. Within the United States, the Coast Guard is tasked with enforcing SOLAS compliance by foreign-flagged ships, both through promulgation of regulations and ship inspection. 33 U.S.C. 1602; Allen, *supra*, at 582. See, *e.g.*, 33 C.F.R. §§ 96.110(a), (c), 96.210(a)(3), 96.310(c) (2003) (Coast Guard applying to ships required to comply with Chapter IX of SOLAS, the Management Code for the Safe Operation of Ships).

[21] Interestingly, respondent's violation of the ADA is in this respect itself a violation of SOLAS: "Clear instructions to be followed in the event of an emergency shall be provided for *every* person on board." SOLAS: CONSOLIDATED EDITION 2001 ch. 3, pt. B, reg. 8, at 303 (Int'l Mar. Org. ed., 2001) (emphasis added).

accompanied by a companion, and its failure to provide any accessible exterior cabins.[22]

Nor can respondent seriously dispute that a significant number of even physical barriers on its ships could be removed without affecting SOLAS obligations: furniture blocking hallways and accessible seating could be rearranged to accommodate wheelchairs; restrooms could be made accessible simply by changing the direction in which the door swings; hydraulic lifts could be installed in swimming pools; and telephones, elevator controls, service counters and drinking fountains could be lowered to heights at which passengers using a wheelchair or scooter can reach them. Carnival Cruise Line, another foreign-flagged cruise line that services U.S. ports, recently agreed to enact precisely these kinds of remedial measures. See generally Exhibit 1 to Carnival Settlement Agreement, *supra*. And as detailed in *supra* Part I.B, Princess Cruise Lines complies with accessibility requirements voluntarily. That such changes do not violate SOLAS is apparent from the fact that Princess and Carnival ships, like other ships using U.S. ports, are inspected for SOLAS compliance quarterly by the U.S. Coast Guard.[23]

For its part, the Fifth Circuit did not identify any current conflict between SOLAS and the ADA or its implementing regulations. Rather, it relied upon a report by the Passenger Vessel Access Advisory Committee ("PVAAC"), which itself

[22] Other Title III violations that can be remedied without making any physical changes to respondent's ships include respondent's requirement that passengers with disabilities self-identify, obtain a doctor's statement before traveling, and waive respondent's liability for personal injuries that occur on its cruises. Similarly, respondent could remedy violations relating to boarding and departure merely by providing passengers with disabilities with assistance and/or allowing them to embark and disembark early. In cases in which ship services such as restaurants and spas are located in inaccessible parts of the ship, respondent could simply provide disabled passengers with the opportunity to experience these services in alternative locations.

[23] See U.S. Coast Guard, Cruise Ship Consumer Fact Sheet, *available at* http://www.uscg.mil/hq/g-m/cruiseship.htm.

purported to identify only *two* conflicts between SOLAS and a series of recommendations for accessibility guidelines that would have applied to newly constructed and altered cruise ships.[24] Pet. App. 9a n.6. But because the PVAAC report discusses only then-proposed regulations, it did not identify any *current* conflicts between SOLAS and Title III. The Court should give the fullest effect to both SOLAS and Title III by requiring foreign-flagged cruise ships in U.S. waters to comply with Title III unless there is a specific, actual conflict with SOLAS. Identification of any such conflicts can properly be left to the expert government regulators that Congress has charged with implementing SOLAS and Title III.

And indeed, as the newer draft guidelines recently released by the Access Board demonstrate, there is in fact no conflict between Title III and SOLAS. The two purported conflicts between the proposed regulations and SOLAS, see PVAAC, Final Report, *supra*, at ch.13, pt. I, were eliminated by the draft guidelines. First, the PVAAC report would have required that at least one accessible exit be an elevator, whereas SOLAS requires two means of egress, neither of which can be an elevator. *Id.* pt. I, at 99. To the extent that these two requirements conflict, any inconsistency is resolved by the draft guidelines, which require only that, in certain situations, an elevator be an additional means of escape for persons with disabilities. See Draft Passenger Accessibility Guideline V207.3, *available at* http://www.

[24] PVAAC was established by the Access Board to make recommendations for cruise ship accessibility, 63 Fed. Reg. 15,175 (Mar. 30, 1998), and issued its final report on November 17, 2000. See PVAAC, Recommendations for Accessibility Guidelines for Passenger Vehicles: Final Report (2000), *available at* http://www.access-board.gov/pvaac/commrept/commrept.pdf . The draft guidelines released by the Access Board on November 26, 2004 are based on (but not identical to) the PVAAC Report. See Draft Passenger Vessel Accessibility Guidelines and Supplementary Information, at Background, *available at* http://www.access-board.gov/pvaac/guidelines.htm .

access-board.gov/pvaac/guidelines.htm#DRAFT. Second, the PVAAC Report would have "require[d] changes in level greater than ½ inches to be ramped," see PVAAC Report ch.13, pt. I, at 100, while SOLAS simply requires that thresholds be "of ample height and strength" and that doors opening to the weather deck be capable of becoming watertight efficiently. *Id.* pt. 1, at 101. Again, to the extent that these two provisions conflict, any inconsistency is resolved by the draft guidelines, which incorporated substantial changes "to address door coaming issues," and which call for the application of one of three configurations depending on the degree to which the door in question must exclude water. See Draft Passenger Accessibility Guideline V404, *available at* http://www.access-board.gov/pvaac/guidelines.htm#DRAFT.

E. Petitioners' Claims Are Not Subject to the Presumption Against Extraterritorial Application of U.S. Law.

The Fifth Circuit finally erred in asserting (Pet. App. 11a) that its holding was supported by the presumption against the extraterritorial application of U.S. law. That presumption plays no role here for two reasons. First, petitioners seek only *domestic* application of the ADA. This Court assumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only *within the territorial jurisdiction of the United States*." *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)) (emphasis added). The presumption invoked by the Fifth Circuit applies only to the application of U.S. law "beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285.

Petitioners are not pursuing claims that the statute prohibits, for example, discrimination in the Bahamas. Rather, petitioners contend that respondent must comply with U.S. law when, for example, selling tickets in this country, when boarding and disembarking passengers in this country,

and when traveling to and from U.S. ports in U.S. internal and territorial waters – conduct plainly falling within U.S. territorial jurisdiction.

The Fifth Circuit rejected that conclusion on the ground that "structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. The court of appeals thereby implausibly allowed the tail to wag the dog: it allowed the incidental overseas effect of petitioners' claims to control the far more substantial application of federal law to respondent's activity *in this country*. But the presumption applies only to cases that "involve[] the *regulation* of conduct beyond U.S. borders." *Environmental Defense Fund* v. *Massey*, 986 F.2d 528, 531 (CADC 1993) (emphasis added). See also, *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that in *Romero*, 358 U.S. at 354, "the presumption against extraterritorial application of federal statutes was inapplicable * * * as the actionable tort had occurred in American waters"); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 181 (1991) (noting that the presumption against extraterritoriality "refers to a presumption that laws regulate only acts occurring within the United States") (footnote omitted). In fact, "[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." *Massey*, 986 F.2d at 531; see also *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1334 (CA2 1972) (noting that when there is "significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law"). The presumption was designed to "to protect against unintended clashes between

our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. The simplest method of avoiding such conflicts is "to assign prescriptive jurisdiction exclusively on the basis of where the conduct occurs." William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 115 (1998)

The absurd results of the Fifth Circuit's contrary position are obvious. Countless provisions of domestic law affect the overseas manufacture of innumerable products. One need look no further than the tort law that governs respondent's ships while docked in this country and that requires respondent to construct and maintain those ships in a fashion that affects their operations worldwide. Yet under the lower court's rationale, such extraterritorial effects preclude the application of that U.S. law despite the fact that the conduct actually occurs in U.S. territory.

The decision below is specifically contrary to this Court's decision in *Cunard*, which held that the National Prohibition Act – which did not expressly apply extraterritorially – applied to foreign-flagged vessels in U.S. territorial waters but not to those sailing outside that boundary. 262 U.S. at 128-29. The Court reached that conclusion despite the fact that the Act directly affected the transportation of goods to and from this country outside U.S. territorial waters.

Second, the Fifth Circuit in effect erected a double hurdle of presumptions – one relating to foreign-flagged ships and another relating to extraterritoriality – that this Court's jurisprudence does not support. Most of this Court's cases involving foreign-flagged vessels implicate the application of U.S. law outside U.S. territory, because such vessels routinely travel into and outside of the United States. Yet this Court has never employed a distinct presumption that, even if U.S. law does govern foreign-flagged ships, Congress nonetheless must include a *further* plain statement of its intent to apply

that law extraterritorially. Hence, once the Court concludes that the ADA applies to foreign-flagged cruise ships, the legal question presented by this case is resolved.

In all events, "[w]hether Congress has in fact exercised [its extraterritorial] authority is a matter of statutory construction." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). In determining congressional intent, this Court has considered "all available evidence about the meaning" of the statute in question. *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993). The previous sections of this brief have shown Congress's commitment to a broad interpretation of Title III and the necessary conclusion that Title III applies to foreign-flagged cruise ships operating in U.S. waters. That conclusion overcomes any contrary "presumption."

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Fifth Circuit should be reversed.

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No. 03-1388

IN THE
Supreme Court of the United States

DOUGLAS SPECTOR, *ET AL.*,
Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189, apply to foreign cruise ships?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

In a corporate reorganization completed in 2004, Norwegian Cruise Line, Ltd. was sold, and certain assets and liabilities, including the defense of the instant case, were assigned to NCL (Bahamas) Ltd. d/b/a NCL. Its corporate parent is NCL International Corporation, which is owned by Arrasas, Ltd., which is owned by NCL Corporation, Ltd., which in turn is wholly owned by Star Cruises Ltd., a Bermuda company. Star Cruises Ltd. is a public company, and its shares are traded on two foreign stock exchanges. For convenience, we will continue to refer to the respondent as "Norwegian Cruise Line" or "NCL."

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INTRODUCTION

This case involves the application of a canon of statutory construction almost as old as the Republic itself: that a congressional act shall not be construed to govern a foreign ship unless Congress clearly expresses its intent for that application. In seeking to apply the Americans with Disabilities Act of 1990 ("ADA") to foreign cruise ships, petitioners cite not a word of the ADA's text or legislative history indicating that Congress intended for the Act to apply to foreign ships. Indeed, the legislative record is devoid of any such intent.

Notwithstanding the important market forces that already are achieving substantial gains for the disabled as the cruise industry makes greater and greater accommodations to attract their business, respondent Norwegian Cruise Line Ltd. ("NCL") believes that this Court should affirm the Fifth Circuit's judgment that the ADA does not apply to foreign cruise ships. At root, petitioners request that district courts, without any particular maritime expertise, be empowered to become special masters of the cruise industry in redesigning and reconstructing such ships to make all passengers – regardless of the nature of their disability – enjoy "equal access" (JA 12 (Compl. ¶ 18)) with each other.

Although cruise ships house, feed, and entertain passengers, they are quite different from land-based hotels, restaurants, and places of entertainment. Foreign ships must comply with the laws of the nation where they are registered, as well as international conventions that seek to ensure the safety of people on board. The construction, design, and equipping of ships has long been a matter for the determination of the flag state, in conjunction with applicable international conventions. Yet, under petitioners' regime, a foreign cruise ship would be obligated to comply with the domestic design and construction laws of every port nation at which they call. Such a regime is obviously impracticable. This Court has long applied a presumption that Congress intends to respect the law of a ship's registration state. And Congress itself has legislated against the backdrop of this Court's

interpretive canon by expressing specifically in numerous other statutes enacted since the nineteenth century when it intends for a law to apply to a foreign ship. The absence of any such indication in the ADA is therefore dispositive.

STATEMENT

1. NCL, a Bermuda corporation, operates a fleet of ocean-going cruise ships registered in The Bahamas that depart on pleasure cruises from ports in the United States and, at present, three other continents. NCL welcomes passengers with disabilities on its ships and is fully committed to making its many disabled passengers' cruise experiences as accessible, integrated, and enjoyable as possible. NCL rejects discrimination against its passengers in any form. Petitioners' insinuations to the contrary are unsupported by the record, unfounded in fact, and contrary to NCL's business interests. Indeed, instead of citing the bare allegations in the complaint, petitioners' brief (at 19, 23) cites "news" stories of NCL's supposed discrimination, which upon closer inspection prove to contain merely quotations of petitioners' counsel or their clients' undocumented allegations, rather than any objectively proven "fact."

Their allegations also concern two of the oldest ships in NCL's fleet, one of which, under NCL's business plan, has already been sold and the other of which will depart the fleet later this year when newer ships under construction will join the fleet. At NCL's direction, and in response to competitive market dynamics in effect throughout the cruise industry, the latest generation of ships – those built since the late 1990s – all contain wheelchair-accessible cabins and public restrooms, ramps throughout public areas of the ship, and special technical devices and innovations developed in the past decade to enhance the cruising experience for passengers with special needs. *See generally* http://www.ncl.com/more/special_services.htm. At present, NCL has 106 wheelchair-accessible cabins in its 13-ship fleet, with more being added as new ships replace older ones. The normal cabin door on a cruise ship containing approximately 1,000 cabins is

approximately 25 inches wide, whereas a 35-inch door (with additional internal space) is needed for wheelchair access. A wheelchair accessible cabin on a new cruise ship is approximately 50% larger than a regular cabin, so, for every two accessible cabins, a cruise line must sacrifice one cabin that would be occupied by paying passengers. NCL does not, however, charge more for those wheelchair-accessible cabins, but it is forced to make an economic calculation at the ship-design stage of how many such cabins to install on its ships, because the space on a ship is finite and design decisions have a profound effect on profitability. On average, less than 1% of the approximately 1,500-2,200 passengers on a typical NCL cruise have special accessibility needs.

The two NCL ships in direct issue in this litigation, the *Norwegian Star*[1] and the *Norwegian Sea*,[2] departed from the Port of Houston, traveled to various foreign ports in Mexico and the Caribbean, and returned to Houston. Both ships were registered in The Bahamas. To be registered in The Bahamas, NCL had to demonstrate compliance with a long list of international convention requirements relating to the construction, design, equipping, and manning ("CDEM") of its vessels. *See* Bahamas *Amicus* Br. 11-12. The ships in NCL's fleet have all been inspected Det Norske Veritas (DNV), one of the world's leading marine classification societies. DNV is one of the approved classification societies used by the U.S. Coast Guard. *See* http://www.uscg.mil/hq/gm/nmc/dnv.pdf.

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[1] The former *Norwegian Star*, on which one of the petitioners sailed, left the NCL fleet in 1998. The old *Star* was one of NCL's oldest and smallest ships. The current *Norwegian Star*, to which petitioners mistakenly refer in their brief (at 18, 23), is not at issue in this case. To the best of NCL's knowledge, no petitioner has sailed on it, and the complaint does not concern the new ship.

[2] Built in Finland in 1988, the *Norwegian Sea* is among the oldest and smallest (capacity of 1,518 passengers) in NCL's fleet and will be removed from the fleet in the summer of 2005.

Every NCL cruise calls at the ports of different foreign nations. NCL currently sails to 23 different foreign countries, with ships that serve in rotations that may change seasonally, sometimes in the U.S. geographical market and sometimes in other markets.[3] At those ports, depending on the nature of the port facilities and shore excursions, the cruise ship might be required to anchor some distance from shore, with passengers needing to transfer to a smaller "tender" ship for eventual passage to shore. Those means of transfer typically are not in NCL's control, but rather under the operation and management of companies based in the port nation.

2. Title III of the ADA, 42 U.S.C. §§ 12181-12189, provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.* § 12182(a). The ADA contains a lengthy and exhaustive list of "private entities [that] are considered public accommodations for purposes of this subchapter." *Id.* § 12181(7). That list includes an "inn, hotel, motel, or other place of lodging," *id.* § 12181(7)(A), and a host of other specified places, such as concert halls, restaurants, and theatres, *id.* § 12181(7)(B)-(L). Ships, foreign or domestic, are not mentioned anywhere in that text, or discussed at all in the ADA's extensive legislative history, which indicates that the 12 listed categories are intended to be "exhaustive."[4]

The ADA also prohibits discrimination in "specified public transportation" services, which is defined as "transportation

[3] At present, NCL also sails to, among other countries: Antigua/St. John's, Argentina, Barbados, Belize, Bermuda, Canada, Chile, Costa Rica, England, France, Grand Cayman, Greece, Honduras, Mexico, Norway, Peru, Portugal, Russia, Spain, St. Maarten, Sweden, Turkey, and Uruguay. *See* http://www.ncl.com/destinations/index.htm.

[4] *See* H.R. Rep. No. 101-485, pt. 3, at 54 (1990) ("These 12 listed categories are exhaustive"); *id.*, pt. 4, at 56 ("The twelve categories of entities included in the definition of the term 'public accommodation' are intended to be exhaustive").

by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." *Id.* § 12181(10). With respect to specified transportation systems, the ADA defines discrimination as "the failure of such entity to—

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title."

Id. § 12184(b)(2).[5]

The ADA's remedial provisions authorize "injunctive relief," which "shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter." *Id.* § 12188(a)(2). *See also id.* § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)'s remedial provision of civil injunctive actions). Congress delayed the effective date of the ADA for 18 months to enable the Department of Justice ("DOJ") to issue implementing regulations for Title III. *Id.* § 12181. By statute, DOJ and the Department of Transportation ("DOT") had 12 months to promulgate those regulations, *id.* § 12186, so that covered entities could take six months to comply. With respect to all land-based public accommodations and the specified transportation systems, DOJ and DOT duly promulgated regulations within the statutory time frame. *See* 56 Fed. Reg. 35,592 (July 26, 1991) (DOJ); 56 Fed. Reg. 45,621 (Sept. 6, 1991) (DOT). Neither agency has ever

[5] Section 12182(b)(2)(A)(ii) and (iii) defines discrimination in terms of affording persons with disabilities an opportunity to participate in benefits and providing separate benefits that are comparable to the non-disabled.

issued proposed, draft, or final rules with respect to cruise ships.[6]

3. After sailing aboard the old *Norwegian Star* and the *Norwegian Sea*, petitioners filed this putative class action on behalf of all "current and former" passengers of all NCL cruises who are mobility impaired or who had a "known association" with mobility-impaired passengers during the cruise. JA 13 (Compl. ¶ 23). Petitioners allege that they have physical impairments that interfere with their ability to walk. JA 9 (Compl. ¶ 6). They further allege that they were denied "full and equal access to NCL services or . . . were discriminated against because of their known association with persons who utilize wheel chairs or scooters for mobility." JA 13 (Compl. ¶ 21). They also contend that NCL's foreign cruise ships are governed by Title III of the ADA and that Title III requires NCL to modify the physical structure of each of its ships.[7] Although the complaint itself merely asks for NCL to "remove architectural barriers when it is readily achievable to do so" (JA 17 (Compl. ¶ 41(3))), petitioners represent that their complaint seeks modifications to the

[6] On November 26, 2004, just days before the topside briefs in this case were due, the Architectural and Transportation Barriers Compliance Board ("Access Board") issued a Notice of Availability of Draft Guidelines. *See* 69 Fed. Reg. 69,244. That same day, DOT issued a related Advance Notice of Proposed Rulemaking. *See* 69 Fed. Reg. 69,246. As DOJ has noted with respect to analogous Access Board guidelines, these types of guidelines "have no legal effect on the public." 70 Fed. Reg. 2992 (Jan. 19, 2005) (discussing Access Board revised guidelines). Petitioners misunderstand the import of these "proposed guidelines" when referring to them as "[n]ewly proposed regulations." Pet. Br. 10. The ANPRM does not contain any "rules," nor even any "proposed rules."

[7] On the same day they filed this case, petitioners sued NCL and three unaffiliated travel agencies in a putative class action in Texas state court claiming damages based on allegations of misrepresentations, fraud, and violations of the Texas public accessibility law. The state court denied petitioners' motion to certify the class (*Spector v. Norwegian Cruise Line Ltd.*, No. 01-02-00017-CV, 2004 WL 637894, at *3 (Tex. App.–Hous. (1st Dist.) Mar. 30, 2004)), and the case is proceeding with the named plaintiffs only.

ships' cabins, restaurants, swimming pools, restrooms, elevators, and other unspecified structures. Pet. 4. Such claims seek physical and permanent reconstruction of the interior of NCL's ships, and entail either the condition of the ships or onboard activities.[8] In the court below, petitioners represented that their complaint entitles them to an injunction ordering NCL to provide "accessible passage" for "shore excursions" in foreign ports. *See* Pet. C.A. Br. 7.

In addition to their direct efforts to obtain injunctive relief that would necessitate substantial modifications to NCL's ships, petitioners also challenge an NCL pricing policy that would have significant architectural consequences. NCL offers passengers a "run-of-the-ship" pricing offer. Under that offer, a passenger pays a set price and is given the best room still available at the time of sailing. The passenger may get a large room at a discount or pay more for a smaller room. Although petitioners appear not to have sought to take advantage of this offer, and thus would not appear to have standing to complain about it, they nonetheless contend (at 17-20) that NCL's special offer is price "discrimination" between disabled and non-disabled passengers. Petitioners do not appear to allege, however, that a non-disabled passenger would pay less to book the class of room that any petitioner purchased.[9]

[8] In their opening brief (at 8, 21), petitioners for the first time in this litigation claim they were denied restroom facilities while waiting to board in the Port of Houston. Even if this new allegation were true, NCL does not own or manage the Houston port facilities, and thus would not be responsible for them under Title III. *See* 42 U.S.C. § 12182(a).

[9] Petitioners' effort to separate NCL's so-called "on-land pricing policies" from its onboard activities also misunderstands the scope of Title III. NCL's policies could not violate Title III unless they relate to "place[s] of public accommodation," 42 U.S.C. § 12182(a), or "specified public transportation services," *id.* § 12184(a), as those terms are defined by the statute. The only policies challenged here relate to the onboard activities on the *Norwegian Star* and the *Norwegian Sea*. In any event, this argument has been waived, *see* Resp. Cert. Br. 11 n.8, as even the government recognizes by the wording of its question presented, *see* Gov't Br. i.

4. In the district court, NCL moved to dismiss petitioners' complaint for failure to state a claim. NCL argued that Title III does not govern foreign ships because there is no evidence that Congress intended the statute to apply to them. NCL also argued that applying Title III to foreign ships conflicts with comity principles and creates potential substantive conflicts with international conventions and foreign law. In the alternative, NCL contended that petitioners' claims seeking the removal of structural barriers on NCL's ships must be dismissed because the federal agencies charged with promulgating architectural and design standards under Title III have not established any standards for ships – despite having had more than a dozen years to do so. Given the procedural context, NCL did not raise the issue whether Title III applies to cruise ships generally, regardless of the ship's national registry. (The court of appeals did not address the issue, *see* Pet. App. 4a n.3, which has not been conceded by NCL and is not before this Court.)

The district court relied on *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002), to hold that Title III applies to foreign ships within U.S. territorial waters. Pet. App. 35a. The court nevertheless dismissed petitioners' barrier-removal claims, recognizing that the lack of architectural standards specific to ships destroys Congress's goal in Title III of establishing uniformity for design and structural aspects of public accommodations. *Id.* at 42a. The court certified its order for interlocutory appeal, identifying two controlling questions of law: "(1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships." Resp. Cert. Br. App. 4.[10]

[10] The courts below referred to the ships at issue as "foreign-flagged ships" or "foreign-flagged cruise ships." In this brief, NCL uses the more concise term "foreign ships," which has the same meaning, *i.e.*, ships registered in a foreign country.

5. The Fifth Circuit held that Title III does not apply to foreign ships. The court observed that, although the United States has the power to subject foreign ships to its laws, whether it exercises that power is within Congress's discretion. Pet. App. 4a-5a. For a court to apply a statute to a foreign ship, it must find specific and clear evidence in the statute or its legislative history indicating Congress's intent to do so. *Id.* at 7a-8a (citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). As the court of appeals explained, "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." *Id.* at 8a. The court further found no evidence that Congress intended for Title III to apply to foreign ships. *Id.*

The court also noted the potential conflict between the requirements of Title III and the International Convention for the Safety of Life at Sea ("SOLAS"), Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, which governs maritime architecture. *See* Pet. App. 8a-9a. The possibility of conflict between Title III and SOLAS, the court ruled, indicated that Title III should not be interpreted to include foreign ships. *Id.* at 9a. The court concluded that the permanent modifications to ship structure and policies sought by petitioners would necessitate an extraterritorial application once the ships left U.S. waters. *Id.* at 11a-13a. The court held that such an application of U.S. law would be impermissible because it found no evidence that Congress intended the statute to apply extraterritorially. *Id.* at 7a-8a.

6. Because the conflict between the Fifth and Eleventh Circuits made it impossible for NCL to know its legal obligations, NCL acquiesced to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

For centuries, the world's maritime nations have consistently recognized that legal issues involving ships are presumptively governed by the law of the country of registration, commonly known as "the law of the flag." This fundamental principle is based not only on a mutual respect for each nation's sovereignty, but also on the practical need to provide consistent regulation of ships in commerce that regularly enter the territorial waters of many different countries. Such consistent regulation is maintained through international treaties and the obligations of the flag states thereunder. If port nations usurp the position of flag states in the regulation of shipping, the international treaties will be undermined as flag nations will no longer be primarily responsible for the ships they register.

The United States has recognized that it must act carefully in legislation intended to apply to foreign ships. This Court has thus consistently held that Congress must speak clearly if it intends for a U.S. domestic statute to apply to foreign ships. Absent that clear statement, this Court's cases hold that application to foreign ships will not be inferred, so as to avoid conflict with the nation of registry. Congress has an extensive history of clearly stating in its legislation when the law is to apply to foreign ships. The same Congress that enacted the ADA without any such indication, for example, extensively debated whether to apply the Oil Pollution Act of 1990 to foreign ships. In finally deciding to do so, Congress provided extensive guidance to the federal agencies charged with enforcing the Act on how those agencies should coordinate their efforts in light of foreign treaties and the laws of other flag nations. By contrast, Congress gave no indication of any kind that the ADA should apply to foreign ships.

Petitioners propose a rule that, unless Congress states otherwise, a U.S. domestic law should be read to apply to foreign ships that enter U.S. waters. This argument contradicts the purpose of the international treaty system for regulation of the high seas and ignores flag-state sovereignty. In effect,

petitioners urge this Court to establish, for interpreting congressional acts, an automatic law of unintended consequences on an international scale. Perhaps because no decision of this Court has ever adopted petitioners' breathtakingly broad and inexact balancing test, petitioners ignore that this case simply requires determining Congress's intent under a canon holding that interference with the law governing a foreign ship will not be inferred absent a clear expression of such intent.

ARGUMENT

I. U.S. STATUTES DO NOT APPLY TO FOREIGN SHIPS ABSENT CLEAR, SPECIFIC EVIDENCE OF CONGRESSIONAL INTENT

A. The Law Of The Registration Country ("Flag State") Presumptively Governs Ships

Under this Court's precedents, it is the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That rule is of ancient origin. *See, e.g., Wildenhus's Case*, 120 U.S. 1, 12 (1887); *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 143 (1812); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120-21 (1804). *See also Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) ("Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag.").

The content of that "law of the flag state" has also long been understood and articulated by this Court. The broad scope of the presumption that domestic statutes do not apply to foreign ships is well illustrated by *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1857), in which this Court refused to apply U.S. patent laws to a French ship docked in the port of Boston. The ship was fitted with equipment for which Brown held the U.S. patent, so he brought an infringement action against the master. The Court recognized that the case turned "on the construction of the patent laws," *id.* at 194, as the United States undoubtedly had the power – if it chose to

exercise it – to enforce its laws against the ship, *id.* The Court considered the exact same argument made by petitioners here: "[t]he general words used in the [statute], taken by themselves, and literally construed, . . . would seem to sanction the claim of the plaintiff." *Id.* But the Court rejected this unduly literal approach, which "has never been adopted by any enlightened tribunal," *id.*, and demanded "plain and express words indicating that such was the intention of the Legislature" before it would extend the statute so broadly, *id.* at 195. To avoid "seriously embarrass[ing] the commerce of the country with foreign nations," *id.* at 197, and "embarrass[ing] the treaty-making power in its negotiations with foreign nations," *id.*, the Court held that the patent law "does not extend to a foreign vessel lawfully entering one of our ports," *id.* at 198. The Court reasoned that "these acts of Congress do not, and were not intended to, operate beyond the limits of the United States." *Id.* at 195. Although the Court did not doubt that Congress had such power, it was "satisfied that no sound rule of interpretation would justify" the Court in extending "the general words used in the patent laws" to "a foreign vessel lawfully entering one of our ports." *Id.* at 198.

As Justice Curtis explained, in the circuit court opinion that this Court unanimously affirmed: "[B]y the general consent of civilized states, the vessels of one nation, though within the ports of another, carry with them the laws of their country, which still govern the rights, duties, and obligations of those on board; and that to the extent of this latter jurisdiction, and for the purpose of enabling it to exist, the vessel is deemed to be a part of the territory of the nation to which it belongs." *Brown v. Duchesne*, 4 F. Cas. 369, 370 (C.C.D. Mass. 1855) (No. 2,004). This Court has subsequently ratified the notion that the law of the state of registration, not the law of the forum, generally determines the substantive law that governs the ship. *See Lauritzen*, 345 U.S. at 585; *Ross v. McIntyre*, 140 U.S. 453, 478-79 (1891). The Court has further explained the rationale for that longstanding rule as

resting on the registration state's regulatory control over the ship wherever it sails. *See Lauritzen*, 345 U.S. at 578-79; *United States v. Flores*, 289 U.S. 137, 156-57 (1933).

By international agreement, that regulatory control exercised by the flag state embraces a range of critical responsibilities. The flag state has the obligation to assure that its ships comply with international duties concerning matters such as protection of life at sea. *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 520, LOS Commentary, Arts. 94, 98 (entered into force September 30, 1962) ("1958 Convention"). With language identical to that of the 1958 Convention, the 1982 Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62-122 ("UNCLOS 1982"), also recognizes the responsibility of the flag state for regulating and implementing any changes to the physical aspects of a vessel. *See* Art. 94, § 3(a).[11] It has thus become the accepted customary international law recognized by the United States that the flag state is charged with "adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard a ship and to maintain good order thereon," and for ensuring safety at sea with regard to "the construction, equipment and seaworthiness of ships." *Restatement (Third) of Foreign Relations Law* § 502 cmt. a,

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[11] While UNCLOS 1982 was not ratified by the United States as a result of an earlier dispute concerning deep sea mining issues, the United States expressly noted that the document otherwise conformed with customary international law. *See* Ronald W. Reagan, Statement on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983) (noting conflict with mining provisions, while maintaining that "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states"). The adherence of the United States to the non-mining portions of the 1982 Convention was reiterated in President Clinton's transmittal letter on October 7, 1994. *See* S. Treaty Doc. No. 39, 103d Cong., 2d Sess. III (1994) ("following adoption of the convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise").

b(1) (1987) ("*Restatement*"). These responsibilities do not ebb and flow depending on the location of the ship; rather, they "continue at all times, wherever the ship is located." *Id.*, cmt. a. *See generally id.* § 502 cmts.

That rationale does not rest on the particular nationality of a ship's registration. Neither Congress nor this Court has ever distinguished among ships flying the flags of open registry countries[12] and those of other flag countries in accepting the basic proposition that the law of the flag state governs internal operations aboard the vessel.[13] *See Lauritzen*, 345 U.S. at 584 ("Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. . . . The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."). *See also* 106 Cong. Rec. 1189, 1190 (1960) ("no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state"); 9 Marjorie Whiteman, *Digest of International Law* 14-15 (1968).

Notwithstanding petitioners' criticism (at 31), the United States has long accepted this idea. Indeed, the United States went to war in 1812 to vindicate the principle that the flag state's law governed the ship. *See Ross*, 140 U.S. at 478. The effect of the War of 1812 and the development of the

[12] An open registry nation is one that allows ships owned by non-citizens of that nation to become a member of the nation's registry. This open registry does not automatically equate to a flag of convenience as is shown in the brief of The Bahamas (at 10-11), which is an open registry nation but not a flag of convenience.

[13] The United States has recognized the need for respect for the flag nation regardless of whether the flag is of open registry or not. The United States opened its own registry and expected other nations to respect its flag when it re-registered Kuwaiti ships sailing in the Persian Gulf in 1987. *See* "U.S. Policy in the Persian Gulf," *U.S. Dep't of State Bulletin*, Oct. 1987.

law led other nations, including Great Britain, clearly to acknowledge the sovereignty of the flag state. Following a careful study of the subject, even the English courts, per Justice Blackburn, came to accept as settled international law that, "where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has the perfect right to legislate for all those on board." *Regina v. Anderson*, 1 L.R.C.C. Res. 161, 169 (1868). This Court should not assume that the United States' current global dominance caused Congress to ignore without comment the principle of respect for the flag to the detriment of smaller nations such as The Bahamas.

B. The United States Does Not Encroach On The Law Of The Flag State Unless Congress Clearly Expresses Its Intent To Do So

This Court has held that, to apply a U.S. domestic law to foreign vessels entering U.S. waters, "there must be present the affirmative intention of the Congress clearly expressed." *Benz*, 353 U.S. at 147. *See also McCulloch*, 372 U.S. at 17-20; *Brown*, 60 U.S. at 195-98. The question in this case, therefore, does not concern the *power* of Congress to so legislate, but rather whether "Congress in fact exercised that authority." *EEOC v. ARAMCO*, 499 U.S. 244, 248 (1991).

In cases that are directly analogous, this Court has found that, where Congress made no expression of the requisite intent, the presumption against applying a statute to a foreign ship governed. In *Benz*, this Court refused to apply the Labor Management Relations Act, 1947 ("LMRA") to picketing in connection with the employment practices on a foreign ship while the vessel was temporarily in a U.S. port. 353 U.S. at 143-44. That holding rested on the absence of an expressed intent to so apply the statute:

> The parties point to nothing in the Act itself or its legislative history that indicates in any way that Congress intended to bring such disputes within the coverage of the Act .... In fact, no discussion in either House of

> Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill.

Id. The Court contrasted the LMRA with other statutes in which Congress *had* specifically evinced an intent for the statutes to be applied to foreign ships, but found that "such a 'sweeping provision' as to foreign applicability was not specified in the [LMRA]." *Id.* at 146 & n.7 (citing *Brown*, 60 U.S. at 197).

Likewise, in *McCulloch*, which addressed whether the National Labor Relations Act ("NLRA") applied to foreign ships, this Court again emphasized that the decisive question was not whether Congress had the power to apply the NLRA to foreign ships, but whether Congress had chosen to do so. *See* 372 U.S. at 17. The *McCulloch* plaintiffs asserted that their case, unlike *Benz*, involved "a fleet of vessels not temporarily in the United States waters but operating in a regular course of trade between foreign ports and those of the United States." *Id.* at 19-20. But this Court rejected that argument because the plaintiffs were "unable to point to any specific language in the Act itself or in its extensive legislative history that reflect[ed] such a congressional intent." *Id.* at 20. Accordingly, the Court held that the NLRA did not apply to foreign ships, and it reiterated that the plaintiffs should petition "to the Congress rather than to us." *Id.* at 22.

C. Non-Interference With The Law Of Foreign Ships Is Complementary To The General Canon That Laws Do Not Apply Extraterritorially Absent A Clear Statement

The foregoing canon of construction against interference with the law of a ship's registration state is akin to a more general canon that this Court has long applied and that is also relevant here: ambiguous statutes that may interfere with the laws of other nations are presumed not to apply outside the

United States' territorial jurisdiction. *See, e.g., F. Hoffman-Laroche, Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004) (citing *McCulloch*, 372 U.S. at 20–22; *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen*, 345 U.S. at 578). This rule of construction reflects principles of customary international law that this Court has found Congress ordinarily seeks to follow. *Id.* (citing *Restatement* §§ 403(1), 403(2) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State)). *See also Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

ARAMCO best illustrates this Court's approach to extraterritorial statutory effects. That case involved an attempt to apply Title VII of the Civil Rights Act of 1964 to conduct between Americans on foreign soil.[14] As with foreign ships, a presumption against applicability protects against unintended clashes with another nation's exercise of its sovereign powers. *Compare ARAMCO*, 499 U.S. at 248 (noting that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord") *with Benz*, 353 U.S. at 147 (noting the possibility of "international discord" resulting from the application of U.S. statutes to foreign ships).

The close analogy between these two situations is further demonstrated by *ARAMCO*'s reliance on *McCulloch* and *Benz*. Notably, *ARAMCO* described *McCulloch* as refusing to apply the NLRA "overseas" and "abroad," 499 U.S. at 251 (citing *McCulloch*, 372 U.S. at 19), even though the basis for the proposed application of the NLRA was that the ships

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[14] The government (at 21) deals with *ARAMCO* by arguing that petitioners' claims concern only the application of U.S. law to U.S. territory. This argument is flatly inconsistent with petitioners' claims for an injunction that requires permanent structural changes to NCL's ships and "accessible passage" for "shore excursions" in foreign ports. *See supra* pp. 6-7.

docked in U.S. ports. The *ARAMCO* Court also cited *McCulloch* to support its reasoning that the presumption against extraterritoriality serves to avoid international discord. *Id.* at 248 (citing *McCulloch*, 372 U.S. at 20-22). *ARAMCO* rested on *Benz* as articulating the test to determine when a statute may be applied extraterritorially. *Id.* (citing *Benz*, 353 U.S. at 147, for the proposition that there must be "the affirmative intention of the Congress clearly expressed").

Ultimately, those cases demonstrate that *Congress's silence has never been read to express an intent to legislate when issues touching on other nations' sovereignty are involved.* "[U]nless there is the affirmative intention of Congress clearly expressed, we must presume it is primarily concerned with domestic conditions." *Id.* (quotations omitted).

D. The "Clear Statement" Rule Embodies Comity Concerns Especially Important To Foreign Ships

This Court has explained that comity is the important principle served by construing domestic legislation not to apply to foreign ships or extraterritorially absent a clear expression of such intent. That canon of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *ARAMCO*, 499 U.S. at 248 (citing *McCulloch*). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity"). Because such interpretations of statutes concern whether Congress intended to exercise American power, the Court has been particularly sensitive to such interpretations, especially where the power "is not mandatory but discretionary . . . [and] . . . [o]ften, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all." *Benz*, 353 U.S. at 142.

The United States adheres to those principles in part so that other countries will not attempt to retaliate against U.S.

interests. *See Lauritzen*, 345 U.S. at 578-82. From its earliest years, the United States has recognized that the Nation's economic well-being rests on the free flow of commerce in international shipping. Although the tides have ebbed and flowed for the U.S. merchant marine, the United States has not wavered in its interest in avoiding undue interference with international shipping and the operation of ships of other nations. Even in the areas in which Congress has chosen to be most involved in regulating foreign ships, *i.e.*, pollution control and national security, Congress has demonstrated its awareness of the potential for conflict with international relations and existing treaties and, specifically, the relations with those countries whose registered ships visit U.S. waters. *See infra* pp. 29-34. Thus, rather than apply its individual domestic laws generally to all foreign ships, the United States adheres to the law-of-the-flag principle absent congressional indications to the contrary.

E. Application Of The ADA To Foreign Ships Poses Significant Risks Of Inconsistent Laws

Ocean-going ships are unique in that they typically transact business in the ports of several nations, and thus could be subject to multiple – and perhaps conflicting – sets of laws. *See Lauritzen*, 345 U.S. at 585 ("[T]here must be some law on shipboard, . . . it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her"). During its lifetime of approximately 30 years, a cruise ship will visit many ports. The *Norwegian Sea*, for example, has called at Houston, Miami, and ports in Mexico, the Caribbean, and South America during the limited period covered by this lawsuit. Given the peripatetic nature of cruise ships, there is a potential that they may be subject to inconsistent results and injunctive orders from various courts pertaining to the operation and structure of the ship.

Cruise ships are not simply floating hotels that can be renovated in one portion of the ship while passengers enjoy the rest of its accommodations. Restructuring must be done while the ship is docked. Indeed, given the complexity of

cruise ships, with literally miles of passageways, thousands of cabins and rooms, and hundreds of doorways on 10 or more decks, the application of Title III to cruise shipping has the potential to have a far greater impact than does application to the public accommodations listed by Congress in the Act. In most circumstances, only companies experienced in maritime construction can undertake extensive structural changes. And any such changes that would need to be made to comply with whatever ADA requirements a district court would impose must also satisfy international safety and flag-state requirements. This usually means that the ship must sail to another port, typically to a country such as Germany, Italy, France, or Finland, where virtually all cruise ships are built and where ADA-compliant engineering standards are not mandated.

By contrast, when uniformity and cooperation for ship standards have been deemed desirable, the United States and other nations have developed a body of international law and reciprocal standards to protect their shared concerns, which include aspects of the design and maintenance of ocean-going ships. *See United States v. Locke*, 529 U.S. 89, 102 (2000). Congress, for example, has expressed support for respect of other nations' laws and international treaties in the important area of pollution control. In *Locke*, the U.S. government advised this Court that the scheme of regulation under a series of treaties and statutes depended on reciprocity in that the United States would allow entry into its ports of ships whose flag nations have warranted their compliance with international standards. *See id.* (noting that "the certification of a vessel by the government of its own flag nation warrants that the ship has complied with international standards, and vessels with those certificates may enter ports of the signatory nations") (citing U.S. brief). There is no reason for this Court to apply a different approach to cruise ships.

The primary body of international law setting out standards governing the concerns of proper design, maintenance, and

safety of ocean-going ships is SOLAS.[15] First adopted in 1914 in response to the *Titanic* disaster, new versions of SOLAS were adopted in 1929, 1940, 1960, and 1974. The 1960 version was the first major task of the International Maritime Organization ("IMO") after that organization was created.[16] International treaties and agreements such as SOLAS are instrumental for the United States to allow for uniformity and avoid conflict between sets of standards that would frustrate maritime commerce and heighten tensions in foreign relations.

Because the Title III barrier-removal provisions may govern the most minute details of maritime architecture in the

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[15] One hundred fifty-five countries, including the United States and The Bahamas, have ratified SOLAS. *See* IMO's "Status of Conventions – Summary," *available at* http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Jan. 27, 2005), and IMO's "Status of Conventions by Country," *available at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11061/status.xls (last visited Jan. 27, 2005).

[16] In 1948, the United Nations established the IMO (originally called the Inter-Governmental Maritime Consultative Organization ("IMCO")) to develop uniform international shipping laws and regulations. *See* Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48, as amended. Its primary function is to avoid the uncertainty that *Lauritzen* noted would be the probable outcome of *ad hoc* regulation by individual nations: "Because of the international nature of the shipping industry, it has long been recognized that action to improve safety in maritime operations would be more effective if carried out in an international level rather than by individual countries acting unilaterally and without coordination with others." International Maritime Organization, *IMO: What It Is, What It Does, How It Works* 3 (1998). IMO's 158 member states represent more than 98% of the world merchant shipping tonnage. Each year, IMO member states, including the United States, send delegations to a wide variety of IMO meetings, most of which are technical in nature. In addition, technical committees are often appointed to continue work between plenary sessions. By this means, conventions are developed and ultimately approved and sent to governments for ratification. More than 40 conventions and protocols have been adopted in that manner, together with more than 800 codes and sets of recommendations that complement the treaties.

quest of ships fully accessible to disabled passengers, those provisions pose a stark likelihood of conflicts with SOLAS. SOLAS is not a static treaty. Rather, it can be and has been quickly amended. The IMO intends SOLAS to stay up-to-date with technical developments in the shipping industry. Under a procedure adopted in 1974, a proposed amendment goes into effect after a set date unless a specified number of parties to the Convention object. That process enables SOLAS to be amended frequently.

The IMO's Maritime Safety Committee ("MSC") has already issued specific accessibility recommendations for vessels.[17] The MSC Guidelines, designed to facilitate "the integration of elderly and disabled persons," address, *inter alia*, elevator configuration, door width, stairway color and construction, accessible seating, hand-rail dimensions and color, cabin configuration, and toilet and bathroom configuration. MSC Guidelines §§ 7-16. Because of The Bahamas' adherence to IMO standards, NCL *must* comply with those standards irrespective of whether they are consistent with whatever a district court might order under the ADA.

[17] *See* MSC Circ. 735, "Guidelines for the Design and Operation of New Passenger Ships To Respond to Elderly and Disabled Persons' Needs" (1996) ("MSC Guidelines"), *available at* http://www.uscg.mil/hq/g-m/nmc/imo/pdf/Circ1/Msc0/735an.pdf (last visited Jan. 27, 2005). These guidelines state that the recommendations apply to the design and operation of new passenger ships, with an emphasis on passenger ferries, which are part of the public transport system. While the documents note that ferries and cruise ships should be considered separately and that the priority application for the present standards is passenger ferries, the guidelines clearly evidence the intention of the IMO to apply its own broad set of accessibility standards to passenger vessels, including cruise ships. Furthermore, the issue before this Court also relates to foreign ferries that operate in U.S. waters. For example, in *Disabled Americans For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 329 F. Supp. 2d 209 (D.P.R. 2004), it was argued that Title III should apply to a foreign ferry sailing between Puerto Rico and the Dominican Republic.

F. Petitioners' Arguments For Ignoring The Clear Statement Canon Are Unpersuasive

Petitioners offer a laundry list of arguments, which make basically three assertions: (1) the Court has supposedly recognized a nationality of passenger distinction in deciding whether Congress intended a statute to apply to a foreign ship; (2) the Court has determined that certain statutes (*e.g.*, Prohibition Act) apply to foreign vessels, and the ADA is no different; and (3) because (petitioners assert) they are asking for the ADA to apply only in U.S. territorial waters, the normal rules of port state control should apply. Those arguments are unpersuasive.

1. Petitioners' effort to limit the *McCulloch-Benz* presumption based on a nationality of passenger distinction is unpersuasive

Petitioners argue (at 36-39) that the presumption limiting the scope of domestic statutes to exclude foreign ships is inapplicable here because the plaintiffs in *Benz* and *McCulloch* were seeking to apply U.S. labor laws to foreign crews, whereas petitioners claim to be requesting that a U.S. statute be applied to "American passengers." Pet. Br. 37.

First, none of this Court's cases cited by petitioners supports the proposition that the law operates like a hermetic seal around certain individuals (but not others) who come into contact with foreign ships. That was not, in fact, the basis on which the Court decided any of those cases. Indeed, the Court rejected that very assumption in *Brown*, in which it held that a U.S. citizen did not get the benefit of U.S. patent laws when a French ship was in Boston harbor. *See supra* pp. 11-12. In that case, this Court rejected virtually all of the general statutory arguments that petitioners advance here. Petitioners neither cite nor discuss *Brown*, which formed the doctrinal underpinning of *Benz*. *See* 353 U.S. at 146 n.7. *See also ARAMCO*, 499 U.S. at 255-59 (holding that Title VII does not protect U.S. citizens working overseas).

Second, even if *Benz* and *McCulloch* were the only relevant cases, there would be no basis for limiting them to their specific facts. A labor regulation on a merchant ship is not materially different from a passenger-accessibility regulation on a cruise ship. As important as a crew is to a merchant ship, passengers are even more important to a cruise ship. The entire design, construction, maintenance, and operation of a cruise ship is tied to its relationship to the passengers.

Third, the fact that *Benz* and *McCulloch* involved the working conditions of foreign crews was significant in part because these conditions were already governed by the flag state's laws, thus creating the potential for a conflict. That fact sustained the Court's conclusion that Congress likely had no intent to apply U.S. labor statutes to foreign ships absent any expression of an intent to do so. *See McCulloch*, 372 U.S. at 20; *Benz*, 353 U.S. at 144.

The same potential for conflict and lack of any congressional intent exists here. Just as the working conditions of foreign crews on foreign ships have historically been governed by the laws of the flag state, so too have issues regarding the structure of the ship and the safety and security of passengers. *See supra* pp. 13-14; *see also* Bahamas *Amicus* Br. 24-26. Moreover, the existence of international regulations creates additional possibilities for conflict. *See supra* pp. 19-20. And, just as in *Benz* and *McCullough*, there is no evidence that Congress intended to apply the ADA to foreign ships. *See supra* pp. 15-16; *infra* p. 29. In neither situation is there a justification for simply presuming, as petitioners do, that Congress meant to intrude in these sensitive areas.

Petitioners' reliance (at 30-31, 38-39) on *International Longshoremen's Local Union No. 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), is misplaced. That case involved *no* conduct or conditions onboard a foreign ship at all. *Ariadne* held merely that the NLRA covered picketing in support of U.S. workers who did "short-term, irregular and casual" *longshore* work for a foreign ship docked in a U.S. port. *Id.* at 199-200. Because the case did not concern the

conduct or conditions on the ship, *Ariadne* did not raise the potential for the intrusion of U.S. law upon matters traditionally governed by the flag state. *Id.* at 200. By contrast, in cases where on-shore labor activity *does* potentially affect those matters, this Court has refused to apply the NLRA. *See McCulloch*, 372 U.S. at 19; *Benz*, 353 U.S. at 147.

That principle of avoiding conflict explained this Court's refusal to apply U.S. domestic laws to foreign ships when to do so would affect their "maritime operations" by increasing their operating costs. In *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974), the Court refused to apply the NLRA to picketing of foreign ships by U.S. labor unions. The picketing was designed to force foreign ships to increase operating costs, either through wage increases to the foreign crew or refusals by U.S. longshoremen to unload the cargo. *Id.* at 114. The Court noted that this increase in operating costs would "have more than a negligible impact on the 'maritime operations' of these foreign ships, and the effect would by no means be limited to costs incurred while in American ports." *Id.*[18] Citing *Benz*, the Court refused to apply the statute. *Id.* at 114-15. *See also American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 224-25 (1974) (refusing to apply NLRA to picketing of foreign ships that had caused stevedores to decline to load and unload the ships; as in *Windward*, this activity would detrimentally affect the ships' maritime operations).[19]

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[18] The Court distinguished *Ariadne*, which had involved only a union's attempt to raise the wages of U.S. dockworkers hired by a foreign ship while it was in a U.S. port. 415 U.S. at 112, 114.

[19] The frequency of a foreign ship's visits to U.S. ports does not change the analysis of the application of an Act of Congress. *See McCulloch*, 372 U.S. at 18-19. "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." *Lauritzen*, 345 U.S. at 581.

2. *Cunard* does not involve the presumption at issue here

Ignoring *ARAMCO*, petitioners instead rely heavily on *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923), which involved the scope of the Prohibition Act. Although petitioners assert that this Court applied the Prohibition Act to foreign ships simply because there was no explicit "exception" made for foreign ships, Pet. Br. 30, this reading is unfounded. In fact, *Cunard* supports *NCL*'s position.

Cunard does not involve the presumption against applying a domestic statute to a foreign ship. Rather, this Court determined that Congress unmistakably *had* intended the Prohibition Act to apply to foreign ships. For example, Congress specifically exempted transportation by ships through the Panama Canal Zone, which would have been unnecessary if the Act did not generally apply to all ships operating in U.S. waters. *See* 262 U.S. at 127-29. Thereafter, an amendment to the Act made it clear that alcohol was not a legitimate sea cargo. *Id.* at 130. Given the specific and general terms of the Act prohibiting importation and exportation of alcohol, the Court found that Congress clearly intended the Act to apply to all ships, foreign or domestic, operating in U.S. waters. *Id.* at 128-29. *Cunard* also found that Congress did not intend for the Act to apply to ships operating outside of U.S. waters. *Id.*

A core purpose of the Prohibition Act was to prevent the importation of liquor into the United States as a means of evading the statute's restrictions on the manufacture of liquor. The text itself stated that "[n]o person shall . . . sell, barter, transport, [or] *import* . . . any intoxicating liquor . . . , and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." 262 U.S. at 126 (emphasis added). An amendment clearly stated that its coverage applied to "*all territory subject to [the] jurisdiction*" of the United States. *Id.* at 127 (emphasis added). The Court noted that the statutory language was modeled after the language of the Eighteenth

Amendment, *id.* at 126, which stated that "the transportation of intoxicating liquors within, [and] the importation thereof into, . . . the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." *Id.* at 121. Only after making note of such expressions did the Court state that no exception for foreign ships had been made, as such an exception would defeat the statute's "obvious purpose." *Id.* at 126. Moreover, application of the Prohibition Act did not force any changes in the construction, design, or equipping of the ship or its crew, unlike the permanent structural changes sought by petitioners.

By contrast, nothing in Title III gives any indication that it was Congress's purpose, or even on Congress's mind, that Title III would regulate the structure, design, and policies of ships – foreign or not. *See infra* p. 29.

3. The port state control cases are also inapposite

Petitioners and their supporting *amici* cite several cases supporting the proposition that the United States has the power to regulate foreign ships in U.S. waters, and from this they leap to the conclusion that U.S. statutes apply to foreign ships "absent some expression of congressional intent" to limit the application of the statute. Pet. Br. 26. Not only does the argument state this Court's long-established presumption exactly backwards, but it also betrays a fundamental misunderstanding of the court of appeals' holding in this case and thus of the controversy at issue. No one – certainly not respondent or the courts below – disputes the *power* of the United States to regulate foreign cruise ships when they are in U.S. waters. This case instead presents a question of statutory construction: when Congress enacted the ADA, did it intend to exercise that power over foreign ships? Accordingly, cases addressing the limits of a port state's power over foreign vessels are completely irrelevant.

A good illustration of how this entire line of cases is inapposite can be found in *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887), better-known as *Wildenhus's Case*, in

which this Court permitted the prosecution of a homicide committed below the deck of a Belgian ship moored at a Jersey City dock. Petitioners and the government stress "the lack of any specific statement of legislative intent," Pet. Br. 29, and that "the statute made no specific reference to foreign ships," U.S. Br. 22,[20] but that is not surprising. The *Wildenhus* Court, in sharp contrast with the situation here, was not construing the underlying statute. Indeed, it would have been surprising if this Court had construed the underlying New Jersey statute – a task better left to the state courts. The issue there, which arose in the context of a habeas case, was whether New Jersey had the *power* to try the prisoner. *See Romero*, 358 U.S. at 382 & n.54 (*Wildenhus's Case* "deal[t] with the sovereign power of the United States to apply its law to situations involving one or more foreign contacts"). Because the Court concluded that New Jersey did have that power, the writ was denied, and no issue of statutory construction was ever considered.

Even if *Wildenhus's Case* had addressed an issue relevant to this case, it would be readily distinguishable on its facts. In *United States v. Flores*, 289 U.S. 137 (1933), this Court suggested that the *Wildenhus* reasoning was limited to "case[s] of major crimes, affecting the peace and tranquility of the port." *Id.* at 157-58. Moreover, the context was entirely different. The objection to the exercise of U.S. jurisdiction was made by the criminal defendant, not the shipowner. From the reported facts, it appears that the ship's officers were responsible for summoning assistance from the

[20] There does not seem to be any basis whatsoever for the government's bold assertion that the New Jersey statute did not refer to foreign ships. The statute under which Wildenhus was prosecuted is neither cited nor quoted in the Court's opinion. *Cf.* 120 U.S. at 3. But the state did quote in its brief the interstate compact giving New Jersey "exclusive jurisdiction of and over the wharves, docks and improvements made on the shore of said State, and of and over all vessels . . . fastened to any such wharf or dock." New Jersey Br. at 3. The New Jersey legislature had expressed its intent to assert jurisdiction over ships in its ports, and Congress had approved that assertion of authority.

New Jersey authorities.[21] Thus *Wildenhus's Case* may stand for little more than the proposition that a shipowner seeking the assistance of U.S. jurisdiction while in U.S. waters can obtain that assistance if U.S. authorities are willing.

II. CONGRESS EXPRESSED NO INTENT FOR TITLE III OF THE ADA TO GOVERN FOREIGN CRUISE SHIPS

A. No Evidence Exists That Congress Intended The ADA To Apply To Foreign Ships

Although Title III of the ADA contains a lengthy and exhaustive list of "public accommodations" and "specified public transportation services," it does not even mention ships, let alone foreign ships. *See* 42 U.S.C. § 12181(7), (10). Moreover, nowhere in the more than three thousand pages of legislative history on the ADA does Congress even suggest that Title III applies to foreign ships. *See* House Comm. on Educ. & Labor, 101st Cong., *Legislative History of Public Law 101-336, The Americans With Disabilities Act* (1990).

The reason for Congress's failure to apply Title III to foreign ships is not at issue in this case. Petitioners seem to think that this Court must divine the reasoning of Congress to remain silent when it could have said the Act applied. While such an exercise is unnecessary, the potential harm to international relations (a concern Congress has indicated when it enacted other U.S. laws to govern foreign ships in specified circumstances) is more than enough explanation for why Congress did not intend to regulate the construction and operation of foreign ships through Title III. The interest of Congress in not regulating foreign ships in all matters is

[21] No one witnessed the murder except crew members, *see* 120 U.S. at 3, so the police must have been summoned by someone from the ship. Certainly, if a crime were committed on a cruise ship today, the master or owner would prefer to turn the case over to local authorities as quickly as possible. Presumably, the Belgian shipowner did not want to transport a murderer back to Belgium for trial. It would be not only risky (the prisoner might kill or injure someone else, perhaps in an effort to escape), but also expensive and disruptive to normal operations.

further shown by the fact that the United States is a party to the Convention on the High Seas, in which it is stated that, "save in exceptional cases," the flag state has exclusive jurisdiction over its vessels. Art. 6, 13 U.S.T. 2312.

B. When Congress Intends To Apply A U.S. Law To Foreign Ships, It Knows How To Express Its Intent

1. Numerous statutes apply specifically to foreign ships

Since at least as early as 1889, Congress has expressed the requisite intent to apply a domestic law to a foreign vessel in the text, legislative history, or the very maritime nature of the law. In that 1889 law – entitled "Regulations as to life-saving appliances on ocean, lake, and sound steamers and foreign vessels" – Congress explicitly mandated that "foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life-saving appliances, their equipment, and the manning of same." Act of Mar. 2, 1889, ch. 418, § 1, 25 Stat. 1012.

A further example is the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. App. §§ 1901 *et seq.*, which permits the inspection and apprehension of vessels suspected of possessing controlled substances. The statute explicitly applies to "vessels subject to the jurisdiction of the United States," which includes vessels "located within the customs waters of the United States" and vessels "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. App. § 1903(c)(1)(C), (D).

In like fashion, the Johnson Act restricts the use of gambling devices on certain property under U.S. jurisdiction, *see* 15 U.S.C. §§ 1171 *et seq.*, and explicitly states its applicability to foreign ships, *see id.* § 1175(a) (making it unlawful to "manufacture, recondition, repair, sell, transport, possess, or use any gambling device ... on a vessel ... documented under the laws of a foreign country"). Numerous other statutes demonstrate Congress's awareness of how to include

"foreign vessels" expressly within a statute's scope when Congress has that intent.[22]

Finally, in considering the analogous circumstance of foreign air carriers, Congress gave careful consideration to the international ramifications of its actions.[23] In 1986, Congress enacted the Air Carrier Access Act ("ACAA"), but made no specific mention of, or provisions for, foreign carriers. In

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[22] *See, e.g.*, 14 U.S.C. § 89(a) (permitting Coast Guard to engage in searches on "waters over which the United States has jurisdiction" of "any vessel subject to the jurisdiction, or to the operation of any law, of the United States"); 18 U.S.C. § 7 (extending under the Violent Crimes Control Act the special maritime and territorial jurisdiction of the United States, to the extent permitted by international law, to any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a U.S. national); 18 U.S.C. § 2274 (making it unlawful for "the owner, master or person in charge or command of any private vessel, foreign or domestic, or a member of the crew or other person, within the territorial waters of the United States" willfully to cause or permit the destruction or injury of such vessel in certain specified circumstances); 19 U.S.C. § 1703 (applying customs enforcement authority to foreign vessels suspected of smuggling merchandise into United States); 46 U.S.C. § 3505 (stating that "a foreign vessel may not depart from a United States port with passengers who are embarked at that port, if the Secretary finds that the vessel does not comply with" SOLAS); 46 U.S.C. § 3502(d) (requiring "foreign vessels arriving at a United States port" to maintain accurate passenger list); 46 U.S.C. § 3504(a) (requiring foreign or domestic passenger vessel accommodating more than 50 passengers to notify passengers of the safety standards applicable to the vessel); 46 U.S.C. § 6101(d)(1) (requiring "a foreign vessel when involved in a marine casualty on the navigable waters of the United States" to report to the Coast Guard); 46 U.S.C. § 9302(a)(1) (requiring U.S. and foreign vessels to engage a U.S. or Canadian registered pilot for navigating a route upon the Great Lakes); 46 U.S.C. § 10313(i) (applying the Seaman's Wage Act to "a seaman on a foreign vessel when in a harbor of the United States"); 47 U.S.C. § 321(b) (requiring foreign vessels in U.S. territorial waters to give "absolute priority" to distress signals from other ships); 47 U.S.C. § 507(a) (foreign vessels navigated in violation of the Great Lakes Agreement or associated rules shall be subject to $500 fine).

[23] Aircraft are flagged in a particular country but move from jurisdiction to jurisdiction as do ships. *See Restatement* § 501 note 10.

2000, Congress amended that Act to include foreign air carriers. In doing so, Congress specifically required those executive branch officials charged with enforcing the ACAA to "act consistently with obligations of the United States Government under an international agreement." 49 U.S.C. § 40105(b) (referenced in 49 U.S.C. § 41705(a)). Consequently, it is abundantly clear that, in amending the ACAA, Congress deliberated on the potential conflict between the statute and international law. *See Torturro v. Continental Airlines*, 128 F. Supp. 2d 170, 180 (S.D.N.Y. 2001).

Congress therefore has expressly provided when it wants a statute to govern a foreign ship. "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989); *see also ARAMCO*, 499 U.S. at 258. The ADA simply does not evince that intent.

2. The same Congress that enacted the ADA extensively debated and enacted a law to apply to foreign ships

That history of congressional awareness of the need to specify application of a statute to foreign vessels gains even more currency in light of the fact that the *very same Congress* that enacted the ADA debated for weeks over whether to impose special design and construction standards on *foreign* oil tankers. The Oil Pollution Control Act of 1990 ("OPA '90"), 46 U.S.C. §§ 9101-9102, explicitly applies to foreign tankers. In the debates leading up to enactment of OPA '90, Congress gave a thorough consideration to the consequences of such regulations for international maritime activities. The Joint House and Senate Committee substituted the phrase "international standards accepted by the United States" for the original language, "customary international law," in § 9101(a)(2)(A). *See* H.R. Conf. Rep. No. 101-653, at 132 (1990). The Committee explained that this modification in the statutory language resulted from the fact that "the United States has not ratified the international

convention on manning, training, certification, and watch keeping for seafarers" and that the "standards under United States law are more stringent than those contained in the convention and those of many other nations." *Id.* As Congress did not want to burden foreign vessels with higher standards than those set out under international law, the Committee expressed its intent "that 'standards equivalent to United States law' or 'international standards accepted in the United States' may be considered to include the convention" and specified that "standards equivalent to those of the convention should be considered as the minimum standard for meeting the requirement of this Section." *Id.*

Congress did the same with other sections of the Act, such as those concerning devices for warning of overfills of cargo tanks. Congress specifically considered the effects on foreign vessels and required that regulations adopted under that section be "consistent with international law." *Id.* at 135-36.

But, as to an additional requirement, Congress decided to buck the international community. The original Senate version of Section 4115 of OPA '90 Act mandated "the completion within one year of a rule-making to require that all affected oil tankers which are newly constructed be equipped with double hulls and double bottoms." S. Rep. No. 101-99, at 14-16 (1990). That structural requirement generated a lengthy debate over Congress's power and the propriety of imposing U.S. standards on the design and construction of foreign vessels. The Senate Commerce, Science, and Transportation Committee specifically stated that "this subsection applies to all affected oil tankers, both foreign and domestic." *Id.* The Committee took that step even though it recognized that the double-hull requirement had been "specifically rejected" by the IMO and it was likely to meet with disapproval in the international community. *Id.* Nevertheless, the Committee "fully intended that the burden fall heavily on the Secretary to implement the requirements unless the evidence against such requirements is both clear and convincing" and directed that any such determination "cannot be based solely

upon foreign policy grounds or the impact of such requirements on U.S. membership in international maritime organizations." *Id.* Given the extensive debate in OPA '90 over the propriety of the U.S. imposing design, equipping, and construction standards on foreign vessels, it is telling – if not completely dispositive – that the same Congress uttered not a single word in connection with legislation that in petitioners' view would have an identical effect on foreign cruise ships.

C. The Remedial Scope Of The Act Does Not Indicate Its Application To Foreign Ships

Title III's remedial focus on protecting U.S. citizens does not of its own force support a supposition that Congress intended the ADA to apply to foreign ships. Under petitioners' theory that a ship must be structurally modified to meet ADA requirements, the protections of U.S. law go wherever an American citizen goes. Yet that has never been the law.

Both Congress and this Court have treated remedial civil rights statutes just like any other statutes by *not* extending their application extraterritorially or to foreign ships absent a clear expression of congressional intent. In 1984, for example, when Congress amended the Age Discrimination in Employment Act of 1967 ("ADEA") to cover Americans employed by U.S. corporations overseas, it explicitly noted the sovereignty and comity issues at stake and took pains to articulate how it had attempted to minimize potential international discord:

> When considering this amendment, the committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for United States corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by United States firms. Moreover, it is the intent of the committee that this amendment not be enforced where compliance with its prohibitions would place a United States company or its subsidiary in violation of the laws of the host country.

S. Rep. No. 98-467, at 27-28 (1984). Nothing similar exists in Title III's text or legislative history to demonstrate Congress's intent to apply the ADA to foreign ships. Indeed, even though the ADA clearly addresses the issue of its possible interference with those of *state* sovereigns by explicitly providing that it will not diminish or weaken similar state laws, *see* 42 U.S.C. § 12201(b), the statute and its legislative history are completely silent with respect to intrusions on the laws of *foreign* sovereigns.

The absence of evidence that Congress intended to apply Title III to foreign ships also contrasts sharply with Title I of the ADA[24] and Title VII. Those statutes – also intended to protect U.S. citizens – demonstrate convincingly that Congress knows how to clearly express its desire to apply an anti-discrimination statute in a foreign context. In *ARAMCO*, this Court found that Congress had not expressed an intent that Title VII apply extraterritorially. *See* 499 U.S. at 258. Following that decision, Congress made several amendments to both Title VII and to Title I of the ADA to indicate such an intent. First, Congress amended both statutes to include, as "employees," U.S. citizens working "in a foreign country." 42 U.S.C. §§ 2000e(f), 12111(4). Second, both statutes exempted employers if compliance would run afoul of the law in the country where a workplace was located. *See id.* §§ 2000e-1(b), 12112(c)(1). *See also* 29 U.S.C. § 623(f)(1) (granting the same exemption under the ADEA). Third, Congress specified that both statutes would not apply to foreign operations of foreign employers not controlled by a U.S. employer. *See* 42 U.S.C. §§ 2000e-1(c), 12112(c)(2)(B).

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[24] Title I of the ADA, 42 U.S.C. §§ 12111-12117, contains the provisions of the Act governing employment.

Although Congress could have amended Title III of the ADA to apply to U.S.-owned or -controlled foreign accommodations, foreign ships, or even U.S. ships in non-U.S. waters, notably, it did not. Title III and its legislative history contain no language whatsoever encompassing ships, foreign or not. Furthermore, Title III also contains no mechanism for dealing with potential conflicts of laws, unlike the amendments described above.

Petitioners also argue (at 36) that the ADA's "liberal purposes" demand a "broad construction." Whatever application this general platitude may have, it does not alter the requisite coverage inquiry to be conducted with respect to foreign ships. *Benz*, *McCulloch*, and *ARAMCO*, each of which involved legislation with similar "liberal purposes," did not enlarge the labor statutes at issue to encompass foreign entities simply to fulfill those purposes. Petitioners' argument (at 33) that to refrain from applying Title III to foreign ships would "render . . . meaningless" the Act incorrectly assumes that Congress intended to regulate the structure, design, and policies of ocean-going ships through the injunctive suits that Congress made the sole remedies in Title III. To restate the obvious, the ADA is not a maritime statute.

Petitioners' further attempt (at 32) to stretch the ADA finds no support in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). If anything, *Yeskey* supports NCL's arguments by demonstrating that Congress knows how to specify its intent to apply a statute to the precise entities – sovereign or otherwise – when it wants to. *Yeskey* was an ADA Title II case[25] in which this Court interpreted the term "public entity" to include state prisons. This Court assumed that Title II could be applied to state entities only if it contained Congress's "unmistakably clear" intent that the

[25] Title II of the ADA prohibits disability discrimination by "public entities." *See* 42 U.S.C. § 12131.

statute be so applied. *Id.* at 208-09.[26] Making such an assumption, the Court easily determined that the statute applied to state prisons because Title II's plain text encompassed "state" entities. The text encompassed "'any department, agency, special purpose district, *or other instrumentality of a State* or States or local government.'" *Id.* at 210 (quoting 42 U.S.C. § 12131(1)(B)) (emphasis added). By contrast, no "foreign" entities of any kind are described in Title III, let alone foreign ships.[27] Accordingly, the remedial purposes of the ADA and its importance as domestic legislation are not justifications for negating the presumption against the application of U.S. law when that law creates a danger of conflicting with the laws of foreign nations or international treaties.

D. Applying The ADA To Foreign Ships Would Create Actual And Potential Conflicts, Thereby Raising The Specter Of International Retaliation

Through structural and non-structural changes, applying the ADA to foreign ships poses actual and potential conflicts.

1. Non-structural changes

Safety is always the paramount concern of any ocean-going craft. Under SOLAS, for example, "[a]ll survival craft required to provide for abandonment by the total number of persons on board shall be capable of being launched with their full complement of persons and equipment within a period of 30 min[utes] from the time the abandon ship signal is

[26] This canon of construction rests on the principle that a statute should be interpreted to preserve, rather than undermine, the states' sovereign powers, *see* 524 U.S. at 208-09 – a principle similar to the sovereignty principles underlying the rule that a statute should not be applied to foreign-flagged ships absent Congress's specific intent. *See supra* p. 15.

[27] The federal government (at 8) also cites *Yeskey*'s reference to the "breadth" of Title II. But *Yeskey* only referenced the statute's "breadth" in rejecting the argument that Congress did not envision its application to "prisons" and "prisoners." 524 U.S. at 211-12. The Court did not hold that the statute's alleged "breadth" permitted its application to state entities. The Court had already found that the statutory text revealed Congress's "unmistakably clear" intent to apply the statute to state entities.

given." Ch. III, Reg. 21.1.4 (2001 ed.). Unlike hotels or restaurants, all ships must meet SOLAS's 30-minute evacuation requirement.

Petitioners complain about NCL's requirements that passengers identify themselves as having a disability and travel with a companion (Pet. Br. 8), but those complaints reflect a fundamental misunderstanding of NCL's paramount duty to put the safety of all its passengers as its top priority. If a fire were to break out on a ship, for example, a deaf person would be unable to hear an alarm, a blind person would be unable to evacuate quickly using the shortest route, and a mobility-challenged person would need special assistance. NCL therefore designates particular crew members to find passengers with special needs and to escort or carry them to evacuation points. A wheelchair bound passenger simply cannot block a hallway to the detriment of other passengers or navigate a stairway in the event of a power loss, so the special NCL teams facilitate their evacuation. In that manner, the safety of *all* passengers can be assured. Such safety measures directly clash with petitioners' conception of "discriminatory practices and policies" (Pet. Br. 17), but they are critical in a life-threatening situation.

2. Structural changes

Even certain of petitioners' proposed structural changes – such as having cabins available throughout the ship – pose safety concerns because of the number of staircases a person would need to traverse to reach evacuation points.[28] As for shipwide structural changes, the overwhelming majority of desired accessibility measures are being designed and built in

[28] Petitioners complain (at 19 & n.7) about NCL's "run-of-the-ship" pricing offer, but that complaint has no merit. It does not appear from the complaint that petitioners sought to participate in that offer, so they have no standing to complain that other passengers were able to benefit from it. Even if they had standing, the safety considerations on a ship would always give the shipowner and the captain the flexibility to decide where to house passengers to maximize the chances for survival for everyone onboard – passengers and crew alike.

the newest ships. That includes specially accessible restrooms throughout the ship; greater accessibility features in restaurants, casinos, and theaters; ramps and wider passageways for wheelchair accessibility; grab-bars and other devices in needed locations; special warning devices for hearing- and vision-impaired persons; and even special technical innovations in tenders that more readily enable passengers with special needs to exit the ship. As one journalist who uses a motorized scooter has written of one of NCL's newest ships, "I found all of the public rooms entirely accessible," and "the ship fully accessible." A. Vladimir, "Freestyle Cruising Is A Winner," 5 *Open World* 5, 6, 7 (Fall 2002). That does not mean, however, that retrofitting *older* cruise ships would be feasible or commercially practicable, or that the United States can act unilaterally to impose its accessibility design requirements on the rest of the world. It plainly makes no sense for a cruise line to expend tens of millions of dollars trying to implement certain accessibility measures on a ship like the old *Norwegian Star* that was designed two decades before enactment of the ADA.

That is particularly true given the economics of the cruise industry: older ships get moved to secondary and foreign markets when they can be replaced by newer ships designed with added accessibility features. Petitioners' complaints about NCL's older ships require such expensive remedial measures that Congress could not have envisioned bankrupting a cruise line to comply with ADA standards so that the main beneficiaries of those changes would be passengers in Asia and Europe, where the older ships are being sent after being replaced by modern ships designed with greater accessibility features. Yet that is the practical consequence of the universe envisioned by petitioners.

Even as to designs for newer ships, the specter of potential and actual conflicts between ADA-imposed standards and international and flag-state standards is real. For example, the Passenger Vessel Access Advisory Committee ("PVAAC"), a DOT creation, has identified some apparent

conflicts between the current Title III barrier-removal standards and SOLAS. *See Recommendations for Accessibility Guidelines for Passenger Vessels*, Ch. 13, Parts I-II (Dec. 2000), *available at* http://www.access-board.gov/pvaac/commrept/index.htm (last visited Jan. 27, 2005) (referencing potential conflicts between SOLAS and the guidelines announced by the ADA Accessibility Guidelines ("ADAAG") Review Advisory Committee, the governmental body tasked by Congress with formulating the Title III barrier-removal guidelines). Thus, there is little, if any, dispute that Title III's barrier-removal requirements potentially conflict with SOLAS, a treaty the United States vigorously enforces. *See Locke*, 529 U.S. at 102-03. Any accessibility regulations promulgated by DOJ and DOT must at least meet the minimum accessibility guidelines issued by the PVAAC. *See* 42 U.S.C. § 12186(c). Under the current law, therefore, DOJ and DOT appear not to have any coherent methodology for relaxing any guidelines that conflict with international treaties or flag-state laws.

Such conflicts are already readily apparent. In 1996, for example, the IMO promulgated accessibility guidelines for large passenger ships. *See supra* p. 22. Among them is the requirement that accessible cabins should be located on or near the embarkation deck to facilitate evacuation of passengers with disabilities in an emergency. *See* MSC Guidelines § 17. However, Title III requires equal, integrated access to all facilities. Under the shore-side regulations applicable to buildings, such access has been interpreted to mean accessible rooms within all price levels. *See* 28 C.F.R. Pt. 36, App. A, § 9.1.4(1). But, given the need to locate accessible cabins near evacuation points and to minimize the number of staircases needed to carry passengers with physical mobility challenges to safe evacuation points, compliance with IMO and SOLAS standards is quite different from petitioners' conception of ADA requirements. Even matters as seemingly simple as accessibility for restrooms present conflicts. The ADAAG and MSG Guidelines have different

requirements for the size and location of bathroom stalls, the space around the toilet, and whether grab-bars must be permanently affixed or folding. *See id.* §§ 4.1.3(11) (public restroom must contain accessible toilet facilities), 4.17.3 (toilet stall dimensions and distance of toilet from side wall), 4.17.6 (grab-bar location); MSC Guidelines § 16, App. Tab D.

The potential for conflict also exists with the laws that flag nations may apply to their own ships. Many nations are enacting regulations governing legal rights of disabled people. A recent survey reveals that 42 countries have disability human rights laws.[29] That number is likely to increase substantially in light of the United Nations' promulgation of Standard Rules for the Equalization of Opportunities of Persons With Disabilities in 1993.[30] Flag nations, such as the United Kingdom, are actively considering the promulgation of regulations specifically applicable to passenger vessels, including cruise ships that it flags.[31]

In addition to actual conflicts with the laws of flag nations, a holding that Congress *sub silentio* applied the ADA to foreign ships runs counter to the reasonable policy judgments of flag states that may prefer to allow market forces to operate on cruise lines to strike the proper balance among accessibil-

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[29] *See* Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, From Principles to Practice: An International and Disability Law and Policy Symposium (Oct. 22-26, 2000), *available at* http://www.dredf.org/international/degener_quinn.html (Oct.-Dec. 2000). See Bahamas *Amicus* Br. 26; Mediterranean Shipping Co. *Amicus* Br. 3.

[30] *See* G. A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, at 202, U.N. DOC. A/48/49 (1993).

[31] *See* Disabled Persons Transport Advisory Committee, *Annual Report 1998 – Report of the Ferries Working Group* (Oct. 1, 1999) (listing "Access to cruise ships" as a Committee priority), *available at* http://www.dptac.gov.uk/98report/5.htm#1. It would appear that compliance with certain proposed U.S. guidelines – with respect to such issues as ramping, width of accessible doors, and amount of force needed to open doors – would conflict with British standards. *See* http://www.dptac.gov.uk/pubs/guideship/pdf/dptacbroch.pdf.

ity, safety, and commercial viability. The legitimacy of this position is underscored by petitioners' own brief (at 18 & n.4), which recognizes that market dynamics in the cruise industry are already responding to the needs of passengers with disabilities. Indeed, in the U.S. market, the latest generation of cruise ships has greatly increased accessibility for the disabled. But to require a major retrofitting of old ships – ordered, designed, and built before enactment of the ADA and likely to be removed from the U.S. market within a few years – is both economically irrational and unsound public policy. This Court should not infer that Congress intended such a bizarre result without expressly indicating such an intent.[32]

The fact that almost all cruise ships are designed and constructed outside the United States creates an additional but major problem for the application of Title III. DOT's recently issued and proposed guidelines call for compliance with U.S. engineering standards. But foreign shipyards do not recognize those standards. Instead, they follow the flag state's (and their own nation's) standards, as informed by international conventions. Classification societies enforce those standards through regular and (in the case of the best societies) rigorous inspections and audits. The international community, with the U.S.'s active leadership, has developed and nurtured that system, which would be undermined if port states could impose their own engineering standards.

Finally, given the debate over the double-hulled tankers in OPA '90, it would have been entirely rational for Congress to have supposed that imposition of ADA standards would encourage international retaliation against the United States, a consequence to be avoided. At the very least, this Court should not simply guess at Congress's intent when Congress

[32] Petitioners also rely (at 18 & nn.4, 5, 9) on settlements reached in lawsuits with other cruise lines. Those settlements, however, do not go nearly as far as petitioners seek in compelling industry-wide changes in compliance with the ADA, and the cruise line defendants in those cases have also reserved certain rights if *Stevens* is overruled.

itself can deliberate over whether the benefits of such an application outweigh its costs.

E. Petitioners' Position Would Apply All U.S. Domestic Laws To Foreign Ships

Petitioners' sweeping legal argument reveals no limiting principle. Under their theory, virtually any law on which Congress has expressed no specific intent will apply to foreign ships or extraterritorially. This Court has already rejected an analogous argument to petitioners' assertion that Title III encompasses foreign ships because the statute's jurisdictional element extends to public accommodations that affect "commerce." In *ARAMCO*, the Court held that Title VII's similar jurisdictional element – present in "any number" of federal statutes, including the ADA – did not demonstrate Congress's specific intent to apply the statute on foreign soil. 499 U.S. at 249-53. The Equal Employment Opportunity Commission ("EEOC"), relying on two statutory terms, contended in *ARAMCO* that Congress intended for Title VII to apply abroad. The EEOC argued that Title VII's definitions of "employer" and "commerce" were sufficiently broad to include U.S. companies located outside the United States. *Id.* Despite conflicting plausible interpretations of the relevant language, the Court found that it "need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application." *Id.* at 250. Moreover, under the EEOC's interpretation, "[t]he intent of Congress as to the extraterritorial application of this statute must be deduced by inference from boilerplate language which can be found in any number of Congressional acts, none of which have ever been held to apply overseas." *Id.* at 250-51 (citing the ADA, 42 U.S.C. §§ 12101 *et seq.*) (other citations omitted).

Similarly, in finding no evidence of such an intent in the phrases "in commerce" and "affecting commerce" in the NLRA, the *McCulloch* Court flatly rejected the exact argument that petitioners are making here:

> Petitioners say that the language of the Act may be read literally as including foreign-flag vessels within its coverage. But, as in *Benz*, they have been unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent.

McCulloch, 372 U.S. at 20. As in *ARAMCO* and *McCulloch*, Title III's inclusion of this exact boilerplate jurisdictional element does not demonstrate that Congress intended to apply the statute to foreign ships.

F. *Stevens* Should Be Overruled

Only the Eleventh Circuit in *Stevens* has applied Title III to a foreign ship.[33] For several reasons, *Stevens*'s analysis is unpersuasive and should be overruled.

First, *Stevens* made wholly unwarranted and contradictory assumptions about what Congress knew when it passed Title III. After acknowledging that "Congress might not have specifically envisioned the application of Title III to ships," *Stevens* determined that some cruise ships could be covered by Title III solely because some areas on cruise ships may themselves fall within the definition of "public accommodations." 215 F.3d at 1241.[34]

The *Stevens* court then jumped to the conclusion that, because the ADA applied to cruise ships, Congress must have intended that it apply to *foreign* ships. *Id.* at 1242-43. The court justified that unfounded leap of logic by citing an

[33] A district court has also recently considered the question presented in this case and, like the Fifth Circuit below, held that Title III does not apply to foreign ships. *See Giacopini v. Crystal Cruises, Inc.*, Case No. C-04-1089MMC (N.D. Cal. June 25, 2004). After reviewing the analysis in both *Stevens* and the decision below, the *Giacopini* court found "the detailed analysis set forth in *Spector* to be persuasive and, for the reasons set forth in *Spector*," found "that Title III of the ADA has no applicability to foreign-flag cruise ships." Slip op. at 10.

[34] It was possible, the Eleventh Circuit acknowledged, that "[s]ome cruise ships may contain none of the enumerated public accommodations" – in that case, "such cruise ships would not be subject to the public accommodation provisions of Title III." 215 F.3d at 1241 n.5.

observation from DOT, made *after* the statute was passed, that most cruise ships serving the United States are foreign-flagged. *Id.* at 1243. It then concluded – after assuming that Congress was aware of the prevalence of foreign ships in the cruise industry – that it "seems strange" that Congress would not have also intended that foreign ships be covered. *Id.* But, if Congress did not necessarily envision that the statute would apply to cruise ships at all, *id.* at 1241, it is difficult to understand how it could have intended that the statute encompass foreign ships. Moreover, when one properly considers (as the Eleventh Circuit did not) the vast body of international maritime law and international comity principles that accord special significance to a ship's flag, it is not remotely "strange" at all that Congress did not intend Title III to apply to foreign ships.

III. MARITIME CHOICE-OF-LAW PRINCIPLES ARE IRRELEVANT TO THE ADA'S PROPER INTERPRETATION

Petitioners' efforts to rely on choice-of-law cases arising under the Jones Act demonstrate a fundamental misunderstanding of the issue before this Court. The question here is whether Congress intended a domestic statute to apply to foreign ships, despite the general presumption against such a broad interpretation, when Congress gave no indication of any such intent. In contrast, this Court has long recognized that the Jones Act was passed to "supplement" the general maritime law, *see Panama R.R. v. Johnson*, 264 U.S. 375, 388 (1924), which has always had the potential to govern foreign ships. The issue in Jones Act cases has never been whether the Act *could* apply on foreign ships, but rather *if* it applied to a particular claim under the circumstances.[35] "The question whether the Jones Act . . . is applicable to a foreign

[35] It is noteworthy that, even under maritime choice-of-law principles, the law of the flag is still of paramount importance. That law "must prevail unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 586. *See also Romero*, 358 U.S. at 384 (applying the law of the flag).

seaman is . . . not a statutory interpretation question but a choice of law question." 10 *Benedict on Admiralty* § 6.03 (7th rev. ed. 2004). Because the *Lauritzen* line of cases addresses an entirely different question than the one now before the Court, it is irrelevant here.[36]

In *McCulloch*, this Court explicitly rejected the use of a choice-of-law analysis in ruling that the NLRA does not apply to foreign ships. The Court explained that the NLRB's "ad hoc weighing of contacts" approach would lead to "embarrassment in foreign affairs and be entirely infeasible in actual practice." 372 U.S. at 19. It "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." *Id.*

As in *McCulloch*, it would be infeasible to determine the application of Title III on a voyage-by-voyage basis, given that foreign ships span a wide spectrum – even within a single operator's fleet – from those that regularly embark passengers in the United States, to those that occasionally do, to those that seldom or never do. Even individual ships have changing itineraries that span the full spectrum. *See, e.g., Norwegian Sea* (*supra* p. 19). This infeasibility is especially significant in the context of Title III, given the permanent structural modifications that petitioners' expansive reading of the statute would require. Unlike the ease with which ships change itineraries, widespread changes to permanent structures would be much more difficult and costly.

The *ad hoc* weighing of contacts approach used in Jones Act cases to choose the governing law should not be adopted here to decide the applicability of Title III to foreign ships. Because ocean-going ships sail between jurisdictions, centu-

[36] It is inconceivable to think, as petitioners apparently do, that Congress must have intended the scope of the ADA to be determined by reference to the *Lauritzen* factors. *See* Pet. Br. 34-36. Even if *Lauritzen* and its progeny were relevant to determining the general scope of a statute, Congress had no occasion to consider this purely maritime line of cases in enacting a statute with no maritime connections whatsoever.

ries of experience have taught that it is best for one set of laws to govern their architecture and internal affairs. *See supra* pp. 19-20. International practice recognizes that international conventions and the flag state's laws should govern.

Petitioners also misapply the maritime doctrine of seaworthiness, but the doctrine applies only to seamen; it does not apply to passengers. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 626, 629 (1959).[37]

Petitioners' citation (at 35) of the choice-of-law clause in NCL's passenger ticket further reflects their confusion about the question presented here. This contractual provision does not extend the application of Title III beyond the scope that Congress intended for it, any more than it makes U.S. aviation or railroad statutes applicable to cruise lines. The clause simply specifies, for cases in which the laws of more than one nation might by their own terms apply, that U.S. law will apply to the extent that NCL is otherwise subject to it.

Petitioners argue that, wherever U.S. citizens go, they take all U.S. laws with them. That remarkable position is contrary to every expectation a passport-carrying passenger has when boarding a foreign cruise ship, knowing that the ship is about to sail to a foreign port and that the casino will open once the ship leaves U.S. territorial waters (because U.S. laws limiting gambling would then cease to apply).[38] Passengers are

[37] Even Prof. Gutoff eventually concedes this point, *see* Gutoff *Amicus* Br. 34, thus undermining his prior insistence that the doctrine is somehow relevant in a case brought by passengers. Perhaps the most relevant portion of that *amicus* brief is the implicit concession that the maritime choice-of-law principles from *Lauritzen* do not apply unless substantive maritime law applies – thus explaining the remarkable (but unsupported) assertion that petitioners could have asserted maritime tort and contract claims. *See* Gutoff *Amicus* Br. 17. If this were true, of course, there would be no point in extending the ADA to cruise ships, let alone to foreign cruise ships.

[38] *See* Johnson Act, *supra* pp. 30-31. In fact, under the U.S. cabotage laws, foreign cruise ships calling at U.S. ports are required to visit a foreign port during every cruise. *See* 46 U.S.C. App. § 289.

required to have appropriate credentials to reenter the United States after the cruise. Passengers on foreign ships are effectively stepping into a foreign country at the moment of embarkation. "American passengers simply do not carry American public policy on their backs wheresoever they may venture." *Hodes v. S.N.C. Achille Lauro*, 858 F.2d 905, 915 (CA3 1998). This Court has recognized that basic fact: "[W]e cannot have trade and commerce in world markets in international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9 (1972). That rule applies most forcefully to foreign ships.

IV. THE INFORMAL DOJ AND DOT INTERPRETATIONS OF TITLE III CANNOT EXTEND THE JURISDICTION OF THE ADA AND ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

This Court has not hesitated to reject agencies' opinions when the Court's task is simply to examine the statutory text and history to determine coverage. *See, e.g., McCulloch*, 372 U.S. at 19 (rejecting the balancing approach adopted by the NLRB to determine whether to apply the NLRA to foreign ships and instead looking directly to evidence of Congress's intent); *ARAMCO*, 499 U.S. at 1235 (rejecting the EEOC's opinion that Title VII applied extraterritorially); *see also Boureslan v. ARAMCO*, 857 F.2d 1014, 1019 n.2 (CA5 1988) (giving "less deference than usual" to the EEOC's interpretation of the scope of Title VII because the question was a "jurisdictional issue with little or no statutory language or legislative history"), *aff'd*, 892 F.2d 1271 (CA5 1990) (en banc), *aff'd*, 499 U.S. 244 (1991).

DOJ and DOT have never promulgated regulations under Title III to govern cruise ships. Indeed, neither agency has issued any regulation under Title III that even mentions ships. The technical assistance manuals and other agency comments that petitioners cite (at 12-13 n.2, 25) are not interpretations derived from formal adjudication or rulemaking procedures and thus are not entitled to *Chevron*

deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

As this Court held in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), "[i]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expects its enactments to be interpreted in conformity with them." *Id.* at 117 n.13 (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)). When Congress enacted the ADA, therefore, it knew from this Court's precedents that Title III would not be applied to foreign ships because there was no clear indication of such coverage. Ignoring that language in *Edelman*, petitioners mistakenly argue that Congress acquiesced to DOT's and DOJ's interpretation of Title III. This argument fails for several obvious reasons. First, petitioners' reliance on *Edelman* is misplaced. *Edelman* involved a dispute over procedure for the EEOC's handling of EEOC charges – a matter within the agency's obvious purview. *See* 535 U.S. at 109 (authority to adopt "suitable procedural regulations" not exceeded). The present case involves the threshold and indisputably substantive issue of whether Title III applies at all. DOJ is entrusted to promulgate regulations implementing the "public accommodations" provisions of Title III, *see* 42 U.S.C. § 12186(b), but it has no institutional maritime expertise, so nothing in that provision would suggest that Congress was empowering DOJ to decide that Title III applies to foreign cruise ships. And the provision conferring authority on DOT to issue regulations for "specific public transportation services," *id.* § 12186(a)(1), clearly encompasses buses, vehicles, and trains, but says nothing about ships, *id.* § 12186(a)(2), (d).

Second, the *Edelman* Court explained that Congress had noted and included the regulation at issue in the *Congressional Record* when amending Title VII, thereby indicating Congress's clear knowledge of that administrative interpretation. *See* 535 U.S. at 117-18. Here, no regulatory statements were ever noted or included in any record of any debate or

proceeding. Finally, courts had upheld the EEOC's regulation, whereas here only the *Stevens* court has been persuaded that Title III applies to foreign ships.

* * * * *

If this Court affirms the Fifth Circuit's judgment, and Congress later chooses to make special provisions for the disabled on cruise ships, it can do so after a full debate about the implications of encroaching on foreign ships and international agreements and with the complexity of such applications in mind. If the Court reverses the judgment below and adopts petitioners' multi-factor balancing test in the face of Congress's silence, however, its holding would necessarily have implications for many statutes that apply generally but express no intent to be applied extraterritorially or to foreign ships. It also would force Congress to consider the potential extraterritorial effects of all its legislation, a needlessly burdensome requirement. Because Congress is in the best position to enact its intent, this Court should apply the canons of construction that cause no intrusion on matters of great international importance.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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IN THE

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Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondent asserts an unconditional right to conduct its business in U.S. territory in violation of the Americans With Disabilities Act: to charge Americans with disabilities more to travel on ships leaving from and returning to U.S. ports; to refuse to provide them with evacuation instructions; to keep in place barriers to their access that could easily be removed; and to exclude them from its vessels altogether. Under respondent's reading of the law, its ships were entitled to discriminate against Americans with disabilities even when they served as "floating hotels" for thousands of visitors to the 2005 Super Bowl in Jacksonville, Florida. See Rania Deimeiz, *Cruise Ships To Serve as Floating Hotels for Super Bowl XXXIX*, TRAVEL DAILY NEWS, Feb. 3, 2005

Respondent's absolutist position refuses to acknowledge that the statutory scheme and this Court's precedents address any legitimate concerns regarding the ADA's application to foreign vessels, without granting cruise lines *carte blanche* to engage in discrimination while conducting business within U.S. territory. First, the ADA does not conflict with international conventions that deal with safety at sea. Title III requires that barriers be removed only when "readily achievable" and operates in harmony with this nation's treaty commitments (which in any event impose only "minimum" standards relating to safety). There is moreover no conflict between the ADA and the disability laws of other countries; if such a conflict developed in the future, it would no doubt be addressed by a new international convention, just as was the case with maritime safety standards.

Second, nothing justifies creating an exception to the strong presumption that U.S. law governs activity within our territory. Respondent's discrimination against passengers and potential passengers does not involve the "internal affairs" of its vessels. Nor do respondent's activities fall within the narrow class of cases in which a foreign vessel's contacts with the U.S. are so incidental as to make the application of

U.S. law inappropriate. Petitioners (like the overwhelming majority of passengers on cruises departing from this country) are U.S. citizens who traveled to and from U.S. ports. The contract between petitioners and respondents was formed in the United States on the basis of advertising here and (by respondent's design) mandates the application of U.S. law to disputes arising from it. Respondent has its principal place of business in this country. Congress could not have intended to carve these facts out of its "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

I. Given That Title III Of The ADA Applies To Cruise Ships Generally, It Follows That The Statute Applies Equally To Foreign-Flagged Cruise Ships.

By its plain terms Title III applies to cruise ships. Congress defined "[s]pecified public transportation" as "transportation by bus, rail, or *any other conveyance* (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." 42 U.S.C. 12181(10) (emphasis added). Moreover, the "commerce" governed by the ADA encompasses "travel * * * between any foreign country or any territory or possession and any State." *Id.* § 12181(1). Given the express exclusion for airlines (which are governed by a separate disability statute), this provision necessarily refers to cruise ships. See Br. 12-13. The agencies charged with implementing Title III have accordingly determined that cruise ships are covered by the ADA, and their conclusions are entitled to deference. See U.S. Br. 12-15; Pet. Br. 12-13. [1]

[1] Indeed, given that the words "territory" or "possession" are commonly used to refer to such island areas as the Pacific Trust Territories, Puerto Rico, and the Northern Mariana Islands, none of which is contiguous with the continental United States, the exclusion of airlines means that the *only* means of travel between a territory or a possession and a State will be by ship. Under respondent's reading, this provision would be a nullity.

NCL's passing suggestion to the contrary is meritless. Respondent's observation that "[s]hips, foreign or domestic, are not mentioned" in the list of public accommodations (Br. 4), ignores that cruise ships "typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities." U.S. Br. 13. Furthermore, the examples cited within each category of public accommodations are illustrative rather than exhaustive. DOJ, Title III Technical Assistance Manual III-1.2000 (1993 & 1994 Supp.), *available at* http://www.usdoj.gov/crt/ada/taman3.html.

The fact that Title III applies to cruise ships necessarily implies that it applies to foreign-flagged ships. If Congress had intended the ADA to reach only the two U.S.-flagged cruise ships that existed when the statute was enacted, it would have said so expressly. Br. *Amici Curiae* of Texas et al. 10. Moreover, Congress would not have intended to permit cruise lines to evade ADA compliance through the nicety of securing a flag of convenience. It is implausible to believe that Congress intended to "leave disabled passengers and their traveling companions in an entire segment of the United States travel industry without any protection against discrimination." U.S. Br. 10. That approach would also have disadvantaged the U.S. maritime industry and turned U.S. law into a one-way ratchet of protections for cruise ships without any offsetting obligations. "Those ships are served by the U.S. Coast Guard; they use port facilities built, and channels dredged, at U.S. taxpayers' expense; and they have access to local police and fire protection, while their owners pay little or no U.S. taxes." Br. *Amici Curiae* of Nine Assns. 17.

Congress moreover decisively rejected respondent's suggestion that discrimination will be sufficiently eliminated by "market forces" (Resp. Br. 1) and "business interests" (*ibid.*). Respondent's brief perfectly illustrates why: NCL made the self-interested "economic calculation" that it will do better by discriminating against passengers with disabilities than by abandoning such practices. *Id.* 3. Congress struck

the balance between the costs of accommodations and the economic interests of business owners in a different place: providing not that cruise ships can exempt themselves outright from Title III, but rather that economic considerations can be relevant to determining whether the removal of a particular barrier is "readily achievable." 42 U.S.C. 12181(9); *id.* § 12182(b)(2)(A)(iv).

II. Respondent Seriously Misdescribes The Allocation Of Jurisdiction Over The Conduct Of Foreign-Flagged Vessels In U.S. Territory.

A. U.S. Law Presumptively Applies to Protect Americans in U.S. Territory.

The very first sentence of respondent's brief makes clear that it can prevail only if this Court accepts as a "canon of statutory construction" that "a congressional act shall not be construed to govern a foreign ship unless Congress clearly expresses its intent for that application." Br. 1. In fact, U.S. law presumptively *does* apply to foreign-flagged vessels operating in U.S. territory with only a narrow exception: matters that affect only the "internal order" of the ship or that only incidentally implicate U.S. interests.

1. Petitioners' opening brief demonstrated that U.S. law presumptively governs in our territory, including with respect to foreign-flagged vessels. This rule is embodied in an uninterrupted line of this Court's precedent stretching well over a century and a half, from Chief Justice Marshall's opinion in *The Schooner Exchange* v. *McFaddon (The Exchange)*, 11 U.S. (7 Cranch) 116 (1812), to *International Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970). See Pet. Br. 28-31. Whether a ship chooses to fly a foreign flag does not change the jurisdictional calculus. Although The Bahamas urges the Court to "reject petitioners' unfounded suggestion" that "foreign flagging is a mere 'façade'" (Br. 10), it is in fact *this Court* that has described

foreign flagging as a "façade" entitled to "minor" weight. *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970).[2]

In arguing to the contrary, respondent relies on *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). But both involved U.S. regulation of the "internal affairs" of the vessel – in particular, the application of U.S. labor law to contracts formed overseas, governed by foreign law, between the foreign ship and its foreign crew. See, *e.g.*, *Int'l Longshoremen's Ass'n* v. *Allied Int'l*, 456 U.S. 212, 221 (1982) ("terms of employment of foreign crews"); *Ariadne*, 397 U.S. at 199-200 ("internal affairs" refers to "seamen on respondent's vessels" and the vessel's "internal discipline and order") (quotation marks omitted). These cases are limited to regulation of "discipline and private matters that do not interest the territorial power" (*Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 239-40 (1931)), in contrast to matters that "involve the peace or dignity of the country, or the tranquillity [sic] of the port" (*Mali* v. *Keeper of the Common Jail of Hudson County (Wildenhus's Case)*, 120 U.S. 1, 12 (1887)).[3] Title III, by contrast does "not extend to areas of a

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[2] This Court's decision in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100 (1923), illustrates that U.S. law applies to foreign-flagged vessels in our territory even when the statute in question would have extraterritorial effects – there, the inability of vessels leaving the U.S. to carry liquor into international waters. Respondent would distinguish the statute in *Cunard* on the grounds that "Congress specifically exempted transportation by ships through the Panama Canal Zone" and, by amendment, "made it clear that alcohol was not a legitimate sea cargo." Br. 26. But the inescapable fact is that the statute in *Cunard* did not mention foreign-flagged vessels. Congress's findings in the ADA moreover make it equally clear that Title III applies to international transportation by ship. See *supra* at 3.

[3] See also PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 179-81, 191 (1927) (noting, *inter alia*, that the port State's law would apply to any action

facility that are used exclusively as employee work areas." 28 C.F.R. pt. 36, App. B, at 611.

That a port state's laws apply to foreign vessels in its territory, subject only to this limited "internal order" exception, is as well established in international law as the rule that the flag state's law generally governs a ship on the high seas. Indeed, the U.S. has entered into myriad treaties expressly embodying this "internal order" distinction.[4]

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onboard a foreign vessel that constituted a "moral disturbance" as defined by the port State's laws); Letter from the Counselor for the State Department to the British Ambassador (n.d.), *quoted in* 2 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 209 (1941) (stating that "when one of its vessels visits the port of another county, it is * * * subject to the laws which govern the port it visits so long as it remains unless it is otherwise provided by treaty," but "by comity, matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquility of the port should be left * * * to be dealt with by the authorities of the nation to which the vessel belongs"); 8 Op. Att'y Gen. 73, 79 (1856) (stating that, in the absence of treaties or other agreements, the territorial jurisdiction may punish a crime committed on a foreign-flagged ship unless the "offence affect only the interior discipline of the ship, without disturbing nor compromising the tranquility of the port").

[4] See, *e.g.*, Consular Convention, Feb. 23, 1853, U.S.-France, art. 8, 10 Stat. 992, 996-97 (the consuls of each country "shall have exclusive charge of the internal order of the merchant vessel of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts"); Consular Convention, Dec. 11, 1871, U.S.-German Empire, art. 13, 17 Stat. 921, 928 (similar); Consular Convention, Nov. 19, 1902, U.S.-Greece, art. 12, 33 Stat. 2122, 2129 (similar); Consular Convention, July 4, 1827, U.S.-Sweden, art. 13, 8 Stat. 346, 352 (similar); Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, art. 23, 33 Stat. 2105, 2116-17; see also 15 Op. Att'y Gen. 178, 180-81

2. Respondent attempts to bring this case within the "internal affairs" doctrine by asserting that the flag state, rather than the coastal state, is responsible for regulating the structure of a foreign-flagged ship. That argument ignores that Title III prohibits discrimination in many respects that have nothing to do with the construction ~~of the~~ ship. This case fundamentally involves the relationship between a cruise line and its passengers and potential passengers. That relationship is manifestly of central concern to the coastal state. Indeed, respondent acknowledged that fact by specifying in its ticket contract that disputes arising under it will be governed by *U.S. law*. J.A. 19, ¶ 28.

Respondent's argument is moreover incorrect on its own terms. While respondent's ships are in U.S. territorial waters and U.S. ports, they are within the plenary jurisdiction of the United States, including with respect to physical aspects of the vessels' construction. The fact that they also must comply with the law of the flag state does not undercut their concurrent obligation to comply with the law of the so-called "coastal state" – here, the United States. Pet. Br. 26-27. See, *e.g.*, *Benz*, 353 U.S. at 142; *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923); *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176 (1903); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812) ; Restatement (Third) of Foreign Relations Law § 513 cmt c. & rptr's n.5 (1986) (*Restatement*) (coastal state has concurrent jurisdiction except in cases of innocent passage).

The contrary claims of respondent and its *amicus* The Bahamas are unfounded and rest on an unjustifiably selective citation of authority. Respondent asserts that it is "accepted customary international law recognized by the United States that the flag state is charged with 'adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard

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(1876) (citing similar treaty with Italy); see generally 2 HACKWORTH, *supra*, at 210.

a ship and to maintain good order thereon,' and for ensuring safety at sea with regard to 'the construction, equipment and seaworthiness of ships'" (Br. 13 (emphasis in Resp. Br.)), and that this responsibility "'continue[s] at all times, wherever the ship is located'" (*id.* 14). Respondent errs to the extent that it suggests that the flag state's power is exclusive. Its quotation of "comment a" to Section 502 of the *Restatement*, which addresses the "Rights and Duties of [the] Flag State," omits the very next sentence, which provides: "As to the *concurrent jurisdiction* of the coastal state over matters that are within the flag state's responsibility under this section, see § 512, Reporters' Notes 5 and 7" (emphasis added). In Section 512, the *Restatement* addresses the "Coastal State['s] Sovereignty Over [The] Territorial Sea," specifying that "the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."

In asserting that the Convention on the High Seas provides "that, 'save in exceptional cases,' the flag state has exclusive jurisdiction over its vessels," Br. 30; see also Bahamas Br. 19, respondent equally misstates the law. The Convention actually provides that "save in exceptional cases expressly provided for in international treaties or in these articles, [a ship] shall be subject to [the flag state's] exclusive jurisdiction *on the high seas*" (Art. 6(1), 13 U.S.T. 2312 (emphasis added)), defined as "all parts of the sea that are *not* included in the territorial sea or in the internal waters of a State" (*id.* Art. 1 (emphasis added)).

Respondent next errs in relying on the United Nations Convention on the Law of the Sea as demonstrating the "regulatory control exercised by the flag state." Br. 13. See also Bahamas Br. 19. In fact, "[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters," the Convention authorizes the coastal state to "take the necessary steps to prevent *any* breach of the conditions to which admission of those ships to internal waters or such a call is subject." Art. 25(2), 21 I.L.M. 1261

(emphasis added). The coastal state's jurisdiction to regulate "design, construction, manning or equipment" is limited only in instances of innocent passage through territorial waters – a scenario not implicated here. *Ibid.*

Finally, The Bahamas misdescribes its exchange of diplomatic notes with the United States as establishing that "ships registered with The Bahamas and flying the Bahamian flag are subject to the sovereign control of The Bahamas." Br. 10. In fact, the exchange states clearly that when Bahamanian-flagged ships are in U.S. territory, they are under "the jurisdiction of the United States *and* The Commonwealth of The Bahamas on the same basis as in the coastal ports." Agreement Effected by Exchange of Notes, Oct. 5, 1982, 35 U.S.T. 3843 (emphasis added).

3. Respondent also attempts to bring this case within the "internal affairs" doctrine on the ground that "[a]s important as a crew is to a merchant ship, passengers are even more important to a cruise ship." Resp. Br. 24. There is no support for the claim that the flag state presumptively has exclusive jurisdiction over matters that are "important" to the ship, for those matters will generally be equally or more important to the coastal state. In considering the question presented here, the Eleventh Circuit thus correctly recognized that "this case does not involve the 'internal management and affairs' of a foreign-flag ship; this case is about whether Title III requires a foreign-flag cruise ship reasonably to accommodate a disabled, fare-paying, American passenger while the ship is sailing in American waters." *Stevens* v. *Premier Cruises*, 215 F.3d 1237, 1242 (2000).

On respondent's view that this case falls within the internal affairs doctrine, there is no persuasive basis to distinguish Title III of the ADA from the "public accommodation" provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, which similarly prohibits discrimination without specifically referring to foreign-flagged ships. If respondent is correct that a foreign-flagged

cruise ship is not a public accommodation for purposes of the ADA, then its position necessarily is that it has the absolute right to discriminate against African-Americans, Hispanics, and Muslims. *Id.* So, too, would it be free to violate the seminal anti-discrimination provisions of 42 U.S.C. 1981.

4. To be sure, the presumption that U.S. law applies to a foreign-flagged vessel in our territory is not absolute. The internal affairs doctrine illustrates that an exception arises when the interest of the United States is so meager – and the interests of the flag state so strong – that Congress presumably would not have intended our law to apply. Although the question is not presented here, it is possible to imagine a narrow class of cases – for example, the relatively rare instance in which a foreign-flagged vessel visits the U.S. not to pick up U.S. passengers, but instead as a temporary destination for foreign passengers – in which even Title III arguably does not apply.

Whether to depart from the basic presumption that U.S. law applies in U.S. territory in an unusual case is properly guided by this Court's decisions articulating maritime choice-of-law principles. See Pet. Br. 34-36. This is not such a case, however. As the National Council on Disability – an independent federal agency – explains:

> the contemporary practice of flying what is known as a "flag of convenience" is simply a business decision that only marginally implicates the sovereign interests of the flagging nation. In stark contrast, however, the United States has a significant interest in ending invidious discrimination against persons with disabilities by cruise lines – particularly when cruise lines are headquartered in the United States, base their ships in U.S. ports, draw their clientele almost exclusively from the United States and advertise and solicit most of their passengers in the United States.

National Council on Disability, *Spector* v. *Norwegian Cruise Line Ltd.* – Background, Legal Issues, and Implications for

Persons with Disabilities i-ii (2005), *available at* http://www.ncd.gov/newsroom/publications/2005/pdf/spector_norwegian.pdf.

The role of choice-of-law analysis is also illustrated by the principal case cited by respondent, *Brown* v. *Duchesne*, 60 U.S. 183 (1857). This Court in *Brown* held that the patent laws did not apply to the foreign vessel in that case because the patent infringement only incidentally involved the United States. "The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the United States." *Id.* at 196. The Court made clear that if the patent infringement had occurred *in this country*, U.S. law *would* have applied because in that instance, the defendant "would undoubtedly have trespassed upon the rights of the plaintiff." *Ibid.*

B. Respondent's Contrary Position Would Eviscerate Settled Law Governing the Conduct of Foreign-Flagged Vessels in U.S. Waters.

Respondent's argument that the treatment of passengers within the territory of the coastal state is governed solely by the law of the flag state, to the exclusion of the United States, would entirely rewrite the law of maritime jurisdiction. The very international conventions respondent cites illustrate the point perfectly. Respondent erroneously attempts to create the impression that, while operating in U.S. waters, its vessels are subject to these conventions merely as a consequence of the law of the flag state. But as respondent's own *amici* explain, those conventions apply in U.S. territorial waters as a matter of *U.S.* law: "Congress has, by statute, prescribed that foreign vessels visiting U.S. ports must be in compliance with such International Maritime Organization instruments as the Convention on Safety of Life at Sea (SOLAS), see 46 U.S.C. 3505, and the Convention on the Prevention of Marine Pollution (MARPOL), see 33 U.S.C. 1904(c) & (d)." P&I Clubs Br. 20. Under those statutes, if The Bahamas were to

withdraw from the conventions, respondent would still remain obligated to comply with them while in U.S. waters.

Numerous U.S. laws dictate the structure of foreign-flagged vessels. For example, respondent itself cites federal legislation in which the United States deviates from the international conventions governing the hull structure of vessels. Br. 33. The Centers for Disease Control also have an active program of inspecting vessels for disease and have issued guidelines for the construction of cruise ships. See Centers for Disease Control, Recommended Shipbuilding Construction Guidelines for Cruise Vessels Destined to Call on U.S. Ports (2001), *available at* http://www.cdc.gov/nceh/vsp/pub/construction%20manual-august%202001.pdf.

It is no answer that these measures specifically refer to foreign-flagged vessels, for respondent's argument goes fundamentally to the allocation of jurisdiction between the flag and coastal states. But in any event, innumerable provisions of U.S. law – including Title II of the Civil Rights Act of 1964, see *supra* at 10 – apply to foreign-flagged vessels without any express statement to that effect. This Court has squarely held that the National Labor Relations Act applies to the operations of foreign-flagged vessels in cases involving U.S. employees. *Ariadne*, 397 U.S. at 195. Similarly, most laws governing port taxes do not refer specifically to foreign vessels, yet they logically apply to foreign-flagged cruise ships. Harbor Maintenance Tax, 26 U.S.C. 4461-4462; Miscellaneous Excise Taxes, 26 U.S.C. 4471-4472. Further, it cannot be seriously argued that NCL is free to violate, for example, the antitrust and racketeering statutes (neither of which mentions foreign-flagged vessels), but that is the necessary consequence of its sweeping position.

Respondent cannot distinguish those statutes on the ground that they do not involve physical changes to the vessel. The same is true of the principal precedents on which respondent relies, which involve the application of federal labor law to the crew of foreign-flagged vessels, and not the

regulation of the ship's construction. In any event, this Court squarely held that the Jones Act – which no doubt required physical changes to ships – protected U.S. employees on foreign-flagged vessels. See *Uravic*, 282 U.S. 234. Professor Gutoff's brief (at 19-20) demonstrates that federal maritime law generally imposes such obligations on cruise ships, and courts have routinely applied general tort principles to the conduct of cruise ships, principles that surely give rise to physical changes to the vessels.[5]

Respondent argues to the contrary (Br. 30-31 & n.22) that some federal statutes do refer to foreign-flagged vessels. But those examples are inapposite. The Air Carrier Access Act (ACAA), 49 U.S.C. 41705(a), was a specific response to this Court's ruling in *U.S. Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), that the Rehabilitation Act does not apply to commercial airlines because they do not receive federal financial assistance. 132 CONG. REC. S11784-08 (1986) (Sen. Dole). Congress's subsequent amendment to the ACAA – to specify that it applied equally to foreign airlines – simply overturned a ruling that claims against those airlines were preempted by

[5] See, *e.g.*, *Spry* v. *Carnival Cruise Lines*, No. 89-55647, 1991 U.S. App. LEXIS 30598 (CA9 Aug. 12, 1991) (stairs); *Carey* v. *Bahama Cruise Lines*, 864 F.2d 201 (CA1 1988) (gangway); *Silivanch* v. *Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001) (spas); *Palmieri* v. *Celebrity Cruise Lines, Inc.*, No. 98 Civ. 2037, 1999 U.S. Dist. LEXIS 10531 (S.D.N.Y. July 13, 1999) (furniture arrangement); *Kunken* v. *Celebrity Cruises, Inc.*, No. 98 Civ. 7304, 1999 U.S. Dist. LEXIS 19321 (S.D.N.Y. Dec. 10, 1999) (doorway ramp); *Parker* v. *Celebrity Cruises, Inc.*, No. 96 Civ. 7469, 1997 U.S. Dist. LEXIS 20666 (S.D.N.Y. Dec. 29, 1997) (collapsing chair); *Monteleone* v. *Bahama Cruise Line, Inc.*, 664 F. Supp. 744 (S.D.N.Y. 1988) (stairs); *Carnival Cruise Lines, Inc.* v. *Snoddy*, 457 So. 2d 379 (Ala. 1984) (bed railing); *Larsen* v. *Sittmar Cruises*, 602 N.Y.S.2d 981 (N.Y. Civ. Ct. 1993) (shower stall); see also Assns. Br. 21 n.75 (identifying other areas in which U.S. law applies to foreign-flagged ships).

the Warsaw Convention. Curtis D. Edmonds, *When Pigs Fly: Litigation Under the Air Carrier Access Act*, 78 N.D. L. REV. 687, 701 (2002). Congress similarly amended Title I of the ADA to specify its extraterritorial application, see 42 U.S.C. 12111(4), 12112(c), in response to this Court's decision in *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 247-49 (1991), that Title VII of the Civil Rights Act of 1964 does not apply overseas. See Arlene S. Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291, 292 (2003). This case, by contrast, involves only the domestic application of Title III.

The remaining statutes cited by NCL illustrate a different point: when Congress enacts legislation focused primarily on ships (as opposed to legislation that covers ships as well as many other facilities or forms of transportation), it sometimes chooses to elaborate on the consequences for foreign vessels. Finally, the many statutory provisions that expressly *exempt* foreign vessels from laws that otherwise would cover them cut against respondent's argument, because these provisions would be unnecessary if federal law presumptively did not reach those ships.[6]

III. Applying Title III To Foreign-Flagged Cruise Ships Does Not Conflict With Any International Obligation.

A. International Law Clearly Does Not Bar Application of Title III to Respondent's Many Acts of Non-Structural Discrimination.

Respondent's brief simply ignores its many acts of discrimination that are totally unrelated to the structure of its ships. Respondent has no serious argument for avoiding the

[6] See, *e.g.*, 26 U.S.C. 861(a)(3), 7701(b)(7) (certain income taxes); 33 U.S.C. 1322(n)(7)(C)(i) (marine sanitation regulations); 46 U.S.C. 14101(4) (vessel measurement); 47 U.S.C. 306 (radio licensing).

application of Title III to those forms of discrimination. No international convention even *obliquely* addresses the question whether cruise lines may discriminate against persons with disabilities. Nor is that subject addressed by the law of the flag state. As the Chamber of Commerce explains, statutes "like the ADA * * * do not have parallels in the Bahamas." Br. 26 n.12. The Bahamas explains that it prefers to "ascribe[] to the aspirations of the ADA" rather than impose actual requirements, for (as it explains in the next sentence) its "fortunes are inextricably intertwined with maritime commerce." Br. 3. The irreducible consequence of respondent's position is that *no* law should apply.

Respondent's unsupported assertion that its ability to flout the ADA's requirements with respect to "[n]on-structural changes" is somehow "critical in a life-threatening situation" (Br. 37-38) is simply absurd. That NCL's safety-related concerns are hollow is plain from the fact that several other cruise lines do not engage in this abject discrimination. How, for example, does NCL enhance the safety of its vessels *by refusing to provide emergency instructions to persons with disabilities?* What life-threatening concerns could conceivably lead NCL to charge higher prices to passengers with disabilities and their companions for accessible rooms; refuse to permit passengers with disabilities to board the ship early so that they can use an accessible restroom; require only passengers with disabilities to waive liability even for injuries completely unrelated to their disabilities; require only passengers with disabilities to travel with a companion even when not justified by safety concerns; discriminate against the companions of passengers with disabilities by making it difficult for them to participate equally in on-board activities; and reserve the right to remove a passenger with disability simply because he or she may threaten the *comfort* of other guests? See Pet. Br. 17-25.[7]

[7] Respondent's assertion that prohibiting its discriminatory pricing policy "would have significant architectural consequences" (Br. 7) is inexplicable. NCL's policy could easily be modified so that persons with disabilities who are currently not eligible for discounted fares are simply *offered a discount*. Because petitioners were ineligible for the "run of the ship" discount as NCL offered it, respondent's claim that "petitioners appear not to have sought to take advantage of this offer, and thus would not appear to have standing to complain about it" (*ibid.*) makes no sense. Respondent also reiterates its assertion in its brief in opposition – which was a basis for its failed effort to reframe the question presented – that this claim was somehow "waived." Br. 7 n.9 (citing BIO 11 n.8). The claim was fully preserved, as explained in petitioners' Reply Brief at the certiorari stage (at 1-2 & n.1).

B. Even as to Construction Requirements, Title III's Application Does Not Conflict with Any International Obligation.

There is no merit to NCL's claims that the application of Title III to its ships would conflict with international law. The international conventions cited by respondent apply equally to ships flagged in the United States, yet respondent *itself* is now bringing into service U.S.-flagged vessels that presumably must comply with the ADA. And although respondent contends that applying Title III to its ships would conflict with international law, at the same time it proudly emphasizes that "the overwhelming majority of desired accessibility measures are being designed and built in the newest" foreign-flagged ships. See Br. 38-39 (detailing extensive "shipwide structural changes"). And other cruise lines comply with Title III in large part. See Pet. Br. 18-24; Assns. Br. 22-25.

1. Much of respondent's objection to "structural" accommodations is simply a play on words, because most of the physical accommodations necessary for a cruise ship to comply with the ADA do not involve the structure or integrity of the vessel itself. For example, petitioners seek to have the doors on toilet stalls swing out, rather than in, and to have grab bars installed so that a person in a wheelchair or a

scooter may maneuver inside. Petitioners seek to have instructions on navigating the ship posted in Braille for persons with visual impairments and to have the height of water fountains lowered. None of these accommodations (nor any similar ones) implicate the safety or structure of the vessel in the slightest. Indeed, if Title III does not apply to its vessels, NCL can decline to make even the most meager accommodations, such as moving boxes and luggage to the sides of hallways when they prevent passengers with mobility impairments from making their way to their cabins.

Respondent broadly asserts that the IMO "has already issued specific accessibility recommendations for vessels" (Br. 22) and that "[b]ecause of The Bahamas' adherence to IMO standards, NCL *must* comply with those standards irrespective of whether they are consistent with whatever a district court might order under the ADA" (Br. 22 (emphasis added)). But the guidelines are, as The Bahamas itself flatly states (at 25), "not binding." Moreover, the guidelines are by their terms limited to ferries; they expressly state that "ferries and cruise ships are very different * * * and should be considered separately." See Maritime Safety Committee, MSC Circ. 735 (1996), *available at* http://www.uscg.mil/hq/gm/nmc/imo/pdf/Circ1/Msc0/735an.pdf.

2. Moreover, the convention on which respondent relies – SOLAS – does not in any sense occupy the field of maritime construction or generally "govern[] maritime architecture." Contra Resp. Br. 9. Rather, as respondent's trade association explains, SOLAS "deals with *safety* at sea" (ICCL Br. 10 (emphasis added)), and even in that respect sets only "minimum" standards (IMO, International Convention for the Safety of Life at Sea, Technical Provisions, *available at* http://www.imo.org/home.asp). The Convention founding the IMO specifies that the "standards" it will adopt relate to "maritime safety, efficiency of navigation and prevention and control of maritime pollution." Convention on the International Maritime Organization, art. 1(a), *in* KENNETH R. SIMMONDS, THE INTERNATIONAL MARITIME ORGANIZATION

51 (1994). The ADA's structural provisions, in contrast, are different in scope, affecting many structural considerations that simply have nothing to do with ship safety.

In all events, no conflict exists between the ADA and any international agreement because Title III by its terms does not override contrary measures relating to safety. As noted *supra* at 11-12, SOLAS and other international agreements apply in U.S. waters as a matter of domestic law because the United States subscribes to them. SOLAS is thus "placed on the same footing, and made of like obligation, with an act of legislation," so that "the courts will always endeavor to construe them so as to give effect to both." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

Title III only requires the removal of barriers to access "where such removal is readily achievable," defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12182(b)(2)(A)(iv), 12184(b)(2)(C), 12181(9). Consistent with Congress's intent "that a wide range of factors be considered" (28 C.F.R. Pt. 36 App. B at 681), the implementing regulations call for the consideration of, *inter alia*, "legitimate safety requirements that are necessary for safe operation," as well as "the impact otherwise upon the operation of the site" (28 C.F.R. 36.104). Courts have construed the "readily achievable" language to preclude accommodations that would violate a local land-use ordinance related to parking (*Parr* v. *L&L Drive-Inn Restaurant*, 96 F. Supp. 2d. 1065, 1088-89 (D. Haw. 2000)), or would violate local building requirements in light of "traffic and safety considerations" (*Speciner* v. *NationsBank, N.A.*, 215 F. Supp. 2d. 622, 633 (D. Md. 2002)). *A fortiori*, the "readily achievable" proviso would preclude changes that would violate a treaty – such as SOLAS – that has been incorporated into U.S. law. Cf. *Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 84-85 (2002) (potential conflict with OSHA safety standards creates "business necessity" that justifies disability-based employment discrimination under Title I of the ADA). Notably, the words "readily achievable"

appear in respondent's brief only once: when quoting petitioners' complaint. See Br. 6.

Given the foregoing, "[b]oth the Department of Justice and the Department of Transportation have interpreted [Title III] to apply to foreign-flagged ships, *except* to the extent that enforcing ADA requirements would conflict with a treaty," and have specified that "to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered 'readily achievable' within the meaning of Title III." U.S. Br. 12 (emphasis added) (collecting authorities). In developing the new draft guidelines governing Title III's application to cruise ships, the government officials charged by Congress with addressing the question accordingly undertook to "structure any requirements to avoid" potential conflicts with "any treaty provisions," specifically including SOLAS. 56 Fed. Reg. 45,600 (1991). In this process, "representatives from the cruise line industry served as committee members and were actively involved in drafting recommendations for proposed regulations addressing accessibility on newly constructed and altered passenger vessels and cruise ships." Br. *Amicus Curiae* of Paralyzed Veterans of Am. et al. 6.

To avoid potential conflicts, the government has proceeded cautiously. Although it has concluded that places of public accommodation on all cruise ships – foreign and domestic, new and old – generally are subject to "all of the title III requirements, including removal of barriers to access where readily achievable," it has specified that the ADA's heightened accessibility requirements for new construction and alterations are not applicable until the government provides particular guidance regarding cruise ships. DOJ, Technical Assistance Manual III-1.2000(D) (Supp. 1994), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

The government has made substantial progress towards providing such final guidance. The relevant agencies issued a final report in 2000, leading to the publication of draft

guidelines in 2004. See 69 Fed. Reg. 69,244 (Nov. 26, 2004) (Access Board); *id.* at 69,246 (Department of Transportation). The guidelines are exceedingly detailed, reflecting the breadth and depth of the study that led to their publication. See Draft Passenger Accessibility Guidelines, *available at* http://www.access-board.gov/pvaac/guidelines.htm. The ongoing comment process, in which the cruise industry has actively participated, provides ample opportunity to identify any potential conflicts. Notably, the guidelines as promulgated are, in the expert judgment of the relevant officials, "fully consistent with SOLAS" and all other "United States treaty obligations." U.S. Br. 28, 30.

Finally, respondent suggests that it could, *in the future*, be subject to inconsistent coastal-state requirements governing structural accessibility for persons with disabilities. The relevant point is that there is no such conflict today. If inconsistent regimes do emerge in the future, then those conflicts can presumably be addressed through the "readily achievable" requirement already present in the statute or by new legislation. The existence of inconsistent regulatory regimes would moreover likely spur the international community to develop a new convention governing accessibility, just as it did with respect to ship safety in SOLAS. The hypothetical prospect of a conflict cannot be the basis for avoiding any regulation whatsoever. Even the longest journeys must begin somewhere.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

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No. 03-1388

In the Supreme Court of the United States

DOUGLAS SPECTOR, ET AL., PETITIONERS

v.

NORWEGIAN CRUISE LINE LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, applies to foreign-flagged cruise ships operating in the ports and internal waters of the United States.

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In the Supreme Court of the United States

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DOUGLAS SPECTOR, ET AL., PETITIONERS

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NORWEGIAN CRUISE LINE LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181-12189, to foreign-flagged cruise ships that pick up passengers at United States ports. With exceptions not relevant here, the Secretary of Transportation is charged with promulgating regulations concerning specified transportation services under Title III, 42 U.S.C. 12186(a), while the Attorney General has responsibility for issuing regulations to carry out the remainder of Title III. 42 U.S.C. 12186(b). The Attorney General also has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). The United States filed briefs as amicus curiae in the district court and the court of appeals in this case and also participated as amicus curiae in *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), reh'g denied, 284 F.3d 1187 (11th Cir. 2002), arguing that Title III applies to foreign-flagged cruise ships docking at United States ports. The United States has an interest in defending its interpretation of the ADA in this case.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as * * * public accommodations, * * * transportation, [and] recreation." 42 U.S.C. 12101(a)(3).

Title III of the ADA provides that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). It defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and that falls within one or more of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. 12181(7). Those categories include places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." 42 U.S.C. 12181(7). Pursuant to its responsibility to interpret Title III, see 42 U.S.C. 12186(b), the Department of Justice has determined that cruise ships function as one or more of the types of places of public accommodation enumerated in the statute, since they typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities. See 56 Fed. Reg. 35,551 (1991); 28 C.F.R. Pt. 36, App. B at 677; Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994).

In addition, Title III of the ADA prohibits discrimination on the basis of disability in the "full and equal enjoyment of

specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. 12184(a). "[S]pecified public transportation" is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter service) on a regular and continuing basis." 42 U.S.C. 12181(10). The Department of Transportation, which promulgates regulations under Title III concerning specified public transportation services, see 42 U.S.C. 12186(a)(1), has determined that cruise ships are covered by Section 12184. 56 Fed. Reg. 45,600 (1991) ("Cruise ships easily meet the definition of 'specified public transportation.' Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce.").

As places of public accommodation and as providers of specified public transportation services, cruise ships must comply with all Title III requirements applicable to the provision of goods and services, which requirements include nondiscriminatory eligibility criteria; reasonable modifications in policies, practices, and procedures; provision of auxiliary aids; and the removal of architectural barriers in existing facilities. 28 C.F.R. Pt. 36, App. B at 677; Technical Assistance Manual III-1.2000(D) (Supp. 1994); 49 C.F.R. 37.5(f) (requiring providers of transportation services to comply with the Department of Justice regulations).

Both the Department of Justice and the Department of Transportation have determined that foreign-flagged cruise ships are subject to the requirements of the ADA when they voluntarily enter the ports or internal waters of the United States. Shortly after passage of the ADA, the Department of Transportation made the determination that foreign-flagged cruise ships serving United States ports are covered by Title III:

> Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations. A state has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports.

56 Fed. Reg. 45,600 (1991). The Department of Justice included a similar statement in its Technical Assistance Manual in 1994. See Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) ("Ships registered under foreign flags that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement.").

In their initial rulemakings, however, both Departments determined that further study was required before they issued separate rules governing the new construction or alterations of passenger vessels. See 28 C.F.R. Pt. 36, App. B at 677; Title III Technical Assistance Manual III-5.3000 (1993) (noting that although there is currently "no requirement that ships be constructed accessibly[,] * * * [c]ruise ships would still be subject to other title III requirements"). The Department of Justice has explained that, although "a ship is not required to comply with specific accessibility standards for new construction or alterations" until specific accessibility standards for new construction or alteration have been developed, "[p]laces of public accommodation aboard ships must comply with all of the title III requirements, *including removal of barriers to access where readily achievable*." Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (emphasis added).

Since that time, the Architectural and Transportation Barriers Compliance Board (Access Board) established a Passenger Vessel Access Advisory Committee (PVAAC) to make recommendations for, *inter alia*, cruise ship accessibility. 63 Fed. Reg. 15,175 (1998). The PVAAC issued its final report in December 2000, with recommendations to the Access Board for shipboard accessibility regulations. See <http://www.access-board.gov/pvaac/status.htm>. The Access Board considered those recommendations and prepared draft guidelines governing accessibility standards for large passenger vessels. On November 26, 2004, the Access Board published a Notice of Availability of Draft Guidelines in the Federal Register. 69 Fed. Reg. 69,244. On that same day, the Department of Transportation published in the Federal Register an Advance Notice of Proposed Rulemaking seeking comments on its consideration of issuing rules based on the Access Board's draft guidelines. *Id.* at 69,246. The Advance Notice of Proposed Rulemaking reiterated the Department of Transportation's longstanding positions that "[c]ruise ships clearly fall into the categories of public transportation and public accommodation and, thus, are subject to the requirements of the ADA," and that "the ADA applies to foreign-flag vessels operating within the internal waters of the United States." *Id.* at 69,249.

2. Petitioners Douglas Spector, Julia Hollenbeck, and Rodger Peters, who have mobility impairments requiring them to use wheelchairs or electric scooters, took cruises in 1998 and 1999 on the M/S Norwegian Sea and the M/S Norwegian Star, ships that sail to and from the Port of Houston, Texas, and are owned and operated by respondent Norwegian Cruise Line Limited d/b/a/ Norwegian Cruise Lines (NCL), a corporation organized under the laws of the Bahamas, with its principal place of business in Miami, Florida. Pet. App. 16a. Petitioners Ana Spector and David

T. Killough (the companion petitioners) are non-disabled individuals who accompanied Douglas Spector and Julia Hollenbeck, respectively, on the cruises. *Ibid.*

On August 1, 2000, petitioners filed suit on behalf of themselves and all persons similarly situated, alleging that NCL discriminated against the petitioners with mobility impairments on the basis of their disabilities and against the companion petitioners because of their association with disabled persons, in violation of Title III of the ADA. Pet. App. 17a-18a. Petitioners sought declaratory and injunctive relief, alleging that they reasonably expected to take future cruises on NCL's ships. *Id.* at 18a.

The alleged ADA violations included imposing higher fares and surcharges for accessible cabins and for assistance and accommodations, 42 U.S.C. 12182(b)(2)(A)(i); using standards or criteria that had the effect of discriminating based upon disability, 42 U.S.C. 12182(b)(1)(D); failing to make reasonable modifications to policies, practices, and procedures, 42 U.S.C. 12182(b)(2)(A)(ii); and failing to remove barriers to access that deprived petitioners of the full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations of the ship, where doing so was readily achievable, 42 U.S.C. 12182(b)(2)(A)(iv). The companion petitioners alleged violations of 42 U.S.C. 12182(b)(1)(E), which proscribes the denial of equal treatment to an individual because of the known disability of an individual with whom he or she is known to have a relationship or to associate.

Petitioners alleged in their complaint that, although each ship can carry hundreds of passengers, each has only four cabins that are considered to be accessible to persons who use wheelchairs or scooters for mobility. Pet. App. 17a. Passengers who require accessible cabins, as well as their traveling companions, are subjected to additional surcharges for their use and for assistance from crew members. *Ibid.* Contrary to representations made to petitioners before their

cruises, NCL's programs, services, and activities were not open and equally accessible to persons with mobility impairments. *Ibid.* For example, NCL placed evacuation equipment and training programs in inaccessible locations. *Ibid.* The barriers to accessibility not only prevented mobility-impaired individuals from participating in the services, programs, and activities on the cruise ships, but also required the companion petitioners to choose between missing inaccessible activities and leaving their mobility-impaired companions alone. *Ibid.*

NCL moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); Pet. App. 18a. The motion argued that requiring foreign-flagged cruise ships to comply with the ADA is an impermissible extraterritorial application of the statute. Pet. App. 19a. It also argued that, even if the statute applies, NCL need not remove barriers to access for persons with disabilities because the administrative agencies charged with enforcement of Title III (the Department of Justice and the Department of Transportation) have failed to promulgate regulations governing new construction and alterations of cruise ships. *Ibid.*

3. The district court granted the motion to dismiss to the extent that it sought dismissal of the claims for removal of barriers to access but denied the motion with respect to the remaining claims. Pet. App. 47a. The court held that Title III applies to cruise ships in general, both as "public accommodations" and as "specified public transportation." *Id.* at 19a-25a. Relying on this Court's decision in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100 (1923), the district court held that foreign-flagged ships that operate in the ports and internal waters of the United States must comply with United States law and that application of Title III to such ships does not involve an extraterritorial application of the statute. Pet. App. 28a-36a. The court rejected NCL's alternative argument that, even if Congress had the

authority to apply the ADA to foreign-flagged cruise ships, it did not intend to exercise that authority. *Id.* at 35a. It found that "failure to accommodate disabled domestic passengers while in domestic territorial waters directly implicates the territorial sovereign's interest in protecting its citizens' rights," *ibid.*, and that, in light of the "intended broad scope of Title III," failure to apply it in these circumstances would "impugn the dignity of the United States ports in which NCL chooses to solicit its customers," *id.* at 34a-35a (finding persuasive the reasoning in *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242-1243 (11th Cir. 2000)).

Although acknowledging that the remaining issue was a difficult one, the district court held that the failure of the Department of Justice and the Department of Transportation "to create guidelines for new construction or alterations of cruise ships * * * bars enforcement of Title III's existing barrier removal guidelines." Pet. App. 42a. Petitioners and respondent appealed.

4. The court of appeals reversed on the coverage issue and accordingly did not reach the barrier removal issue. Pet. App. 1a-15a. The court agreed that a foreign-flagged ship that voluntarily enters United States waters subjects itself to the laws and jurisdiction of the United States. *Id.* at 4a (citing *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)). It concluded, however, that Congress must clearly evince an affirmative intent to apply a particular law to foreign vessels entering United States waters. Pet. App. 5a (citing *Benz*, 353 U.S. at 147). It found no such clearly expressed intent in either the statutory text or the legislative history of the ADA. *Id.* at 8a.

The court also concluded that Title III should be narrowly construed against application to foreign-flagged cruise ships because requiring removal of physical barriers to access on a ship could have extraterritorial effects. As a result, the court concluded, barrier removal standards might potentially

violate international treaties, such as the International Convention for Safety of Life at Sea (SOLAS). Pet. App. 8a-9a (citing *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

The court also concluded that the longstanding position of the Departments of Justice and Transportation that Title III applies to foreign-flagged cruise ships entering United States ports was too "informal" to be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). The court declined to accord the agencies' positions any "respect" under *Christensen* because it found them "not persuasive." *Id.* at 14a.[1]

SUMMARY OF ARGUMENT

Title III of the ADA applies to *all* cruise ships, including foreign-flagged vessels, that enter the internal waters and ports of the United States to pick up American passengers. Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It intended the ADA to eliminate, to the full extent of Congress's authority, discrimination against persons with disabilities in such areas as public accommodations, transportation, and recreation. There can be no dispute that cruise ships fall within the ADA's prohibition of discrimination in "public accommodation[s]," as well as in the provision

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[1] The court of appeals did not reach the question whether the absence of new construction or alteration regulations for passenger vessels precludes application of Title III. See Pet. App. 14a n.10. That issue is therefore not presented here. As explained in the government's amicus brief below (Gov't C.A. Br. 18-26), the absence of new construction or alteration regulatory guidelines in no way excuses passenger vessels from complying with other Title III requirements, including the obligation to remove barriers to access where doing so is readily achievable.

of "specified public transportation services." 42 U.S.C. 12182(a), 12184(a).

Contrary to the court of appeals' conclusion below, the foreign-flag status of a cruise ship does not affect the authority of the United States to protect its citizens within United States territory. Moreover, because virtually all cruise ships serving American ports are foreign flagged, the decision below would effectively leave disabled passengers and their traveling companions in an entire segment of the United States travel industry without any protection against discrimination. There is no reason to believe Congress would have intended such a result.

Instead, there is every reason to believe that Congress intended the ADA to apply to foreign vessels in United States ports based on the plain terms of the Act and the longstanding principle that foreign-flagged ships voluntarily entering the ports and internal waters of the United States subject themselves to the jurisdiction and laws of the United States. See, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923). Nothing in the ADA exempts foreign-flagged ships (or any other foreign entity doing business within the United States) from Title III's non-discrimination and accessibility requirements, and any such exemption would be inconsistent with the statute's unambiguous and broad text, as well as its underlying purposes. As in *Cunard*, failure to apply United States' law to the foreign-flagged cruise ships at issue here would "embarrass [the] enforcement" of Congress's comprehensive, nationwide scheme and "national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12102(b)(1), and would "defeat the attainment of [the ADA's] obvious purpose." 262 U.S. at 126.

Contrary to the court of appeals' analysis, this case does not involve an extraterritorial application of United States law such as was at issue in *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 247-248 (1991), but instead

involves a straightforward application of United States law within the territory of the United States. As *ARAMCO* and a host of other cases make clear, the general rule is that a law applies in United States territory without regard to whether it applies to foreign entities within that territory or indirectly causes such entities to alter their conduct abroad.

Nor does this case implicate this Court's decisions in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), in which the Court declined, absent an affirmative expression of intent by Congress, to apply the National Labor Relations Act to disputes between a foreign-flagged vessel and its foreign crew that concerned solely the internal management and affairs of the ship. Those cases reflect a longstanding distinction in this court's maritime cases between actions on board a foreign-flagged ship that affect only "the peace of the ship"—i.e., the internal management and order of the vessel—and those that are "of a nature to disturb the public peace" or "affect those on shore or in the port." *Mali* v. *Keeper of the Common Jail (Wildenhus's Case)*, 120 U.S. 1, 17 (1887). There can be no question that the type of discrimination prohibited by Title III significantly affects the rights and interests of the American public and is not limited to the "peace of the ship." That is particularly true given that the Title III requirements at issue here apply only to *public* accommodations and specified *public* transportation services within United States territory. As this Court explained in *Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 240 (1931), in a case involving whether United States law should apply to torts committed on foreign vessels docked in United States ports, it would be "extraordinary" to deny the application of United States law to Americans on board a foreign ship in a United States port.

The court of appeals was also incorrect in concluding that application of Title III to these foreign-flagged cruise ships is likely to involve a conflict with customary international

law or treaties. Both the Department of Justice and the Department of Transportation have interpreted the statute to apply to foreign-flagged ships, except to the extent that enforcing ADA requirements would conflict with a treaty. Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994); 56 Fed. Reg. 45,600 (1991). Moreover, to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered "readily achievable" within the meaning of Title III. See 42 U.S.C. 12182 (b)(2)(A)(iv); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994). Thus, the requirements of Title III can be readily harmonized with the requirements of the International Convention for Safety of Life at Sea (SOLAS) and other international conventions governing passenger vessels. But far from attempting to harmonize the ADA with SOLAS or other treaties, as this Court's cases require, the court of appeals presumed "potential[] conflict[s]" between Title III's barrier-removal standards and SOLAS without identifying a single such conflict—presumed or actual. Pet. App. 9a n.6. Moreover, the relevant regulatory agencies have recently published notices concerning draft accessibility guidelines for passenger vessels that are specifically designed to comply with all United States treaty obligations.

ARGUMENT

TITLE III OF THE ADA APPLIES TO FOREIGN-FLAGGED CRUISE SHIPS OPERATING IN THE PORTS AND INTERNAL WATERS OF THE UNITED STATES

A. Cruise Ships Are Subject To Title III's Non-Discrimination And Accessibility Requirements

1. *Title III Clearly Applies To Cruise Ships*

Title III of the ADA, by its plain terms, applies to cruise ships in the internal waters and ports of the United States. Indeed, cruise ships plainly fit within two separate provi-

sions of Title III's non-discrimination and accessibility requirements.

First, cruise ships fit within Title III's prohibition of discrimination in "public accommodations." Cruise ships qualify as public accommodations in a number of respects, including as "place[s] of lodging," 42 U.S.C. 12181(7)(A); "restaurant[s], bar[s], or other establishment[s] serving food or drink," 42 U.S.C. 12181(7)(B); "place[s] of exhibition or entertainment," 42 U.S.C. 12181(7)(C); and "place[s] of exercise or recreation," 42 U.S.C. 12181(7)(L). Cf. *Daniel* v. *Paul*, 395 U.S. 298, 304-308 (1969) (concluding that lakeside amusement park with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar was a "public accommodation" under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which served as the model for Title III of the ADA). Cruise ships are, thus, a quintessential public accommodation. The Department of Justice, which promulgates regulations under those provisions of Title III not related to transportation, see 42 U.S.C. 12186(b), has determined that cruise ships function as one or more of the types of places of public accommodation enumerated in the statute, because cruise ships typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities. See 56 Fed. Reg. 35,551 (1991); 28 C.F.R. Pt. 36, App. B at 677 (concluding, *inter alia*, that "a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are 'necessary'" to the provision of the services or accommodations being offered); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (concluding that cruise ships "must comply with the applicable requirements of title III").

Second, cruise ships fit comfortably within Title III's guarantee of "full and equal enjoyment of specified public transportation services." 42 U.S.C. 12184(a). Title III

defines "specified public transportation" to include "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter services) on a regular and continuing basis." That definition is plainly broad enough to encompass cruise ships, which constitute an important segment of the United States travel market and annually transport millions of United States residents on cruises departing from United States ports. The Department of Transportation, which promulgates regulations under Title III concerning public transportation services, see 42 U.S.C. 12186(a)(1), has so determined. See 56 Fed. Reg. 45,600 (1991) ("Cruise ships easily meet the definition of 'specified public transportation.' Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce.").

Thus, by its terms, Title III unambiguously applies to cruise ships. That conclusion is underscored by the breadth of Title III's inclusive terms and this Court's analysis in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998). In *Yeskey*, this Court held that the prohibition of discrimination by any "public entity" in Title III of the ADA applies to state prisons. In so holding, the Court was willing to assume that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners,'" but it concluded that the ADA's "unambiguous statutory text" rendered that assumption "irrelevant." *Id.* at 212. The Court emphasized that "the fact that a statute," such as the ADA "can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

For the reasons explained, the text of Title III unambiguously applies to all cruise ships in the internal waters and ports of the United States. But even if some ambiguity existed, the contemporaneous and consistent regulatory

determinations of both agencies charged with implementing Title III that it applies to cruise ships are entitled to deference. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984)).

2. *Foreign-Flagged Cruise Ships Are No Less Subject To Title III*

Nothing in the statute exempts foreign-flagged ships (or any other foreign entity doing business within the United States) from Title III's non-discrimination and accessibility requirements, and any such exemption would be inconsistent with the statute's unambiguous and broad text, as well as its underlying purposes. Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It therefore intended the ADA to eliminate, to the full extent of Congress's authority, discrimination against persons with disabilities in such areas as public accommodations, transportation, and recreation. Accordingly, both the Department of Transportation and the Department of Justice have concluded that Title III applies to *all* cruise ships that enter the ports or internal waters of the United States, regardless of their flag status. See 45 Fed. Reg. 45,600 (1991); Title III Technical Assistance Manual III-1.2000(D) (1994); see also 69 Fed. Reg. 69,244, 69,246 (2004).

Indeed, as the Department of Transportation recognized in determining that Title III applies to foreign-flagged cruise ships entering United States ports, "[v]irtually all cruise ships serving U.S. ports are foreign-flag vessels." 45 Fed. Reg. 45,600 (1991). Thus, the regulatory conclusion that cruise ships are covered by Title III necessarily reflects a conclusion that foreign-flagged cruise ships are covered. Likewise, any exclusion from Title III's coverage for foreign-flagged cruise ships would leave disabled passengers and

their traveling companions wide open to discrimination in an entire segment of the United States travel industry. Congress could not have intended such a result. The court of appeals' contrary conclusion in this case was premised on an erroneous understanding of settled principles of international maritime law and this Court's cases.

Because of the ADA's broad prohibition of discrimination and the absence of any exception for state prisons, the Court in *Yeskey* held that the ADA more than satisfied the requirement that Congress make an "'unmistakably clear'" expression of intent before a court will conclude that it intended to alter the usual constitutional balance between the States and the federal government. 524 U.S. at 208-209. That same conclusion applies here, such that even if a clear statement of congressional intent were required before Title III could be applied to foreign vessels in United States ports, the text of Title III would readily satisfy that requirement.

B. As This Court Has Long Recognized, Foreign-Flagged Ships Voluntarily Entering The Ports And Internal Waters Of The United States Are Subject To United States Laws

Because Congress intended the ADA's "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" to reflect the full "sweep of congressional authority," 42 U.S.C. 12102(b)(1) and (4), the statute does not exempt from coverage public accommodations or transportation services operated by foreign corporations. See 42 U.S.C. 12182, 12184. There is no reason to believe that Congress intended any different result for cruise ships that voluntarily enter United States ports to engage in business inside United States territory. That is particularly true given that Congress expressly defined the term "commerce" as used in Title III, consistent with the full range of its power over foreign commerce, to include "travel, trade, traffic, commerce, transportation, or communication

* * * between any foreign country or any territory or possession and any State." 42 U.S.C. 12181(1) and (1)(B). While the conclusion that Title III encompasses foreign-flagged ships is particularly clear in light of Congress's express aim of creating a comprehensive ban on discrimination against individuals with disabilities throughout the Nation, it also follows from the more general maritime principle that a ship sailing under a foreign flag or registered in a foreign country is subject to the generally applicable laws of the countries in which it chooses to do business. See *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176 (1903) ("[W]hen a foreign merchant vessel comes into our ports, *like a foreign citizen coming into our territory*, it subjects itself to the jurisdiction of this country.") (emphasis added).

Thus, as this Court explained in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923), "a merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter," and this "jurisdiction attaches in virtue of her presence, just as with other objects within those limits." While present within the sovereign territory of another country, the foreign-flagged ship "is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them." *Ibid.*; accord *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.").

Courts have recognized this principle from the earliest stages of our Nation's history. Chief Justice Marshall, for example, writing for the Court in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812), explained that "when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not

owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

This understanding, moreover, is reflected in settled principles of international maritime law, which draw a distinction between ships that merely seek "innocent passage" through a nation's territorial sea and ships, such as respondent's cruise ships, that do business in a nation's ports. In the "innocent passage" context, the coastal state "may adopt laws and regulations relating to innocent passage through the territorial sea only with regard to safety of navigation, protection of cables and pipelines, fishing, the prevention of pollution, scientific research, and the enforcement of customs, fiscal, immigration, and sanitary regulations." Restatement (Third) of Foreign Relations Law § 513(2)(b) (1986). But the coastal state's jurisdiction over foreign-flagged ships entering its internal waters and ports is much broader. It has the same sovereignty over those areas as it has over its land territory. Thus, a coastal state "may condition entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations." *Ibid.*, cmt. c; see *ibid.*, Reporter's Note 5 ("Once a [foreign] commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state.").

This Court's decision in *Cunard*, which reflects these international maritime principles, is particularly apposite. *Cunard* involved the National Prohibition Act (ch. 85, § 1, 41 Stat. 305), which was enacted pursuant to the Eighteenth Amendment. The Attorney General construed the Act to prohibit all ships, whether sailing under domestic or foreign flag, from bringing intoxicating liquors intended for beverage purposes into the territorial waters of the United States. 262 U.S. at 120. Foreign corporations owning passenger ships of foreign registry operating between United States ports and foreign ports challenged the Attorney General's interpretation and argued that the Act did not apply to alcoholic beverages that were taken on board at foreign ports

for the use of passengers and crew members during the voyage. *Id.* at 119-120.

The Court noted that the Eighteenth Amendment "could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States" and was "made to cover both when within those limits," since it contained no exception of ships of either class and such an exception would "embarrass its enforcement and [] defeat the attainment of its obvious purpose." 262 U.S. at 125-126. The Court concluded that the National Prohibition Act, enacted to enforce the Amendment, was intended to have the same broad scope.

The rationale of *Cunard* strongly supports application of Title III of the ADA to foreign-flagged cruise ships operating in United States ports and internal waters. Like the National Prohibition Act, Title III of the ADA establishes a comprehensive, nationwide scheme, as well as a "national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12102(b)(1). The court of appeals distinguished *Cunard* based on the "all-pervasive reach of the Eighteenth Amendment and its enforcing statute," Pet. App. 10a, but provided no reason for concluding that Congress intended the ADA to be any less "pervasive." None exists. Moreover, as was true of the Act in *Cunard*, failure to apply Title III to foreign-flagged cruise ships would "embarrass [the] enforcement" of the comprehensive scheme created by Congress and would "defeat the attainment of [the scheme's] obvious purpose," 262 U.S. at 126, *viz.*, the comprehensive, nationwide protection of Americans with disabilities from unlawful discrimination.

C. This Case Does Not Involve An Extraterritorial Application Of United States Law

The court of appeals declined to follow the clear import of this Court's decision in *Cunard* based on a mistaken application of the presumption against extraterritorial application

of United States laws. Pet. App. 10a (citing *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)). It found that the barrier removal requirements of Title III would inevitably have an extraterritorial application because of the likelihood that required structural changes would be permanent and would therefore continue to have effects after the ship left United States waters. Pet. App. 11a. Such extraterritorial effects, it concluded, were not presented by the application of the National Prohibition Act to foreign-flagged ships at issue in *Cunard*.

In *Cunard* itself, however, application of the National Prohibition Act inevitably had an extraterritorial effect. Although the steamship company in *Cunard* had offered to keep the liquor under lock and key while the ship was in a United States port, this Court held that merely bringing alcoholic beverages into the territorial waters of the United States was sufficient to violate the Act. 262 U.S. at 130. Accordingly, the owners of the ship had to modify their conduct outside United States territorial waters, either by ceasing to carry liquor on board altogether if it planned to come into United States internal waters, or by jettisoning all remaining liquor before entering those waters. See *Grogan* v. *Hiram Walker & Sons*, 259 U.S. 80, 89-90 (1922) (Holmes, J.) (Volstead Act prohibited transfer of alcoholic beverages from one British vessel to another in New York harbor).

More fundamentally, this case does not involve the kind of extraterritorial application that triggers the *ARAMCO* presumption. In *ARAMCO*, the EEOC sought to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to protect American workers employed by American employers abroad. The proposed application of Title VII would have been *entirely* extraterritorial. This Court rejected that extraterritorial application, explaining that "[i]t is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"

499 U.S. at 248 (citation omitted). This case, by contrast, involves the application of Title III "within the territorial jurisdiction of the United States," which, of course, includes the internal waters and ports of the United States. The default presumption, as *ARAMCO* itself makes clear, is that a law applies in United States territory to all entities, including foreign entities, regardless whether it indirectly causes such entities to alter their conduct abroad.

Many applications of United States laws to foreign entities present in the United States give rise to similar or greater risks of affecting the foreign entity's practices outside United States territory. Certainly, for example, foreign manufacturers shipping goods into the United States may alter their manufacturing practices overseas in response to United States product liability or environmental safety standards, but that does not constitute an "extraterritorial" application of United States law. The same potential for altering actions overseas would result from applying tort liability under the Jones Act, 46 U.S.C. App. 688 (1994), to foreign vessels present in United States ports or internal waters, but that did not stop this Court from doing precisely that, without any clear statement requirement. See, *e.g.*, *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959).

D. This Court's Cases Limiting The Application Of United States Labor Laws To Avoid Pervasive And Unwarranted Regulation Of The Internal Management And Order Of Foreign Ships Are Inapposite

The court of appeals also erred in relying (Pet. App. 5a-8a) on this Court's decisions in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143-147 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-22 (1963), in which this Court declined, absent an affirmative expression of intent by Congress, to apply the National La-

bor Relations Act to disputes between a foreign-flagged vessel and its foreign crew that concerned solely the internal management and affairs of the ship. That narrow presumption is applicable only in contexts involving "the pervasive regulation of the internal order of a ship," and the Court in *McCulloch* expressly noted that its decision would not foreclose application of United States statutes in a different context (such as application of the Jones Act), where such pervasive regulation of internal order may not be present. 372 U.S. at 19 n.9.

Moreover, as the Court in both *Benz* and *McCulloch* explained, its holdings were merely an extension of the rule expressed in *Mali* v. *Keeper of the Common Jail (Wildenhus's Case)*, 120 U.S. 1, 12 (1887), that "by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." Where, however, crimes or other conduct on board a foreign-flagged ship are "of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority." *Ibid.* Thus, the Court in *Wildenhus's Case* upheld the application of New Jersey's murder statute to prosecute the murder of one Belgian national by another aboard a Belgian vessel while docked in a New Jersey port, even though the statute made no specific reference to foreign ships and the murder was witnessed only by other crew members.

In so holding, the Court in *Wildenhus's Case* emphasized that the relevant question was whether the on-board conduct "is of a nature to disturb the public peace" and "is of a character to affect those on shore or in the port when it becomes known." 120 U.S. at 17. If so, "it is a 'disorder,' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done." *Id.* at 18. Thus, the Court concluded: "The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction." *Ibid.*

Justice Holmes, writing for the Court in *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), applied that same analysis and concluded that a Jones Act tort committed on a foreign vessel in a United States port implicated more than the mere "peace of the ship." Relying on *Cunard*, the Court observed that "[t]he jurisdiction and the authority of Congress to deal" with such a tort on a foreign vessel "are unquestionable and unquestioned." *Id.* at 238. It characterized such tortious conduct as of "universal concern" and emphasized that "[t]he rights of a citizen within the territorial limits of the country are more extensively determined by the scope of actions for torts than even by the law of crimes." *Ibid.* "There is strong reason," the Court concluded, "for giving the same protection to the person of those who work in our harbors when they are working on a German ship that they would receive when working upon an American ship in the next dock." *Ibid.* Because "[i]t always is the law of the United States that governs within the jurisdiction of the United States" and because the alleged tortious conduct went "beyond the scope of discipline and private matters that do not interest the territorial power," the Court concluded that "[i]t would be extraordinary to apply German

law to Americans momentarily on board of a private German ship in New York." *Id.* at 240.

Here, application of Title III of the ADA likewise plainly involves far more than the mere "peace of the ship." At issue is not merely the internal management or affairs of foreign-flagged ships, but their accessibility to and treatment of Americans with disabilities and their traveling companions who board those vessels in United States ports. The discrimination alleged by petitioners is precisely the type of private action Congress sought to prohibit by enacting the ADA. Indeed, Title III's application to places of *public* accommodation and *public* transportation services makes clear that those ships that Title III reaches will necessarily implicate the *public* peace. Like the murder statute in *Wildenhus's Case* and the Jones Act tort standard in *Uravic*, Title III prohibits discrimination "of a nature to disturb the public peace" and "of a character to affect those on shore or in the port when it becomes known." 120 U.S. at 17. Although, as in *Wildenhus's Case* and *Uravic*, application of United States law in this context may have an incidental effect on the duties of some foreign crew members, the primary purpose and effect is not to regulate the internal affairs of the foreign ship but to regulate relations between the foreign ship and Americans granted rights and protections under United States law. Moreover, ships that do not constitute places of public accommodation or provide public transportation will not be subject to the Title III requirements at issue here and their internal peace will remain undisturbed.

In analogous situations involving application of the NLRA to the relationship between foreign-flagged ships and American workers at United States ports, this Court has not hesitated to apply United States law, even though there was no specific reference to foreign vessels. See *International Longshoremen's Ass'n Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970). The Court has applied similar principles

in construing the Jones Act, 46 U.S.C. App. 688 (1994), a statute that previously authorized suits by "any seaman" injured in the course of his employment.[2] The Court established an eight-factor test to determine whether to apply United States law to such maritime actions. See *Rhoditis*, 398 U.S. at 306; *Romero*, 358 U.S. at 354; *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).[3] In applying this test, the Court has held that international law principles do not prohibit a court from applying American law to a maritime action by a foreign crew member against a foreign-flagged ship when the injury occurs in American waters and the ship has a substantial base of operations in the United States. *Hellenic Lines Ltd.*, 398 U.S. at 308-309.

Far from requiring a clear statement of congressional intent, these cases make clear that where conduct on a foreign ship in United States ports or internal waters affects the rights of United States citizens and residents, there is a strong presumption that United States law, not the law of the flag state, applies. This Court has consistently applied United States law whenever conduct on a foreign ship in a United States port had any meaningful impact on citizens and residents of the United States, and Title III's application to places of public accommodations and public transportation guarantees such an impact. Indeed, in *Uravic* the Court viewed as "extraordinary" the notion that foreign law would apply to Americans on a foreign ship in a United States port.

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[2] The Act has subsequently been amended to more clearly delineate its jurisdictional reach by restricting its availability to U.S. seamen in certain circumstances. See 46 U.S.C. App. 688(b) (1994).

[3] The factors considered include: (1) the place of the wrongful act; (2) the law of the flag; (3) the nationality of the injured party; (4) the nationality of the shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the ship owner's base of operations and the extent of his or her contacts with the forum state. See *Hellenic Lines Ltd.*, 398 U.S. at 308-309; *Lauritzen*, 345 U.S. at 583-591.

E. Application Of Title III To Foreign-Flagged Cruise Ships Entering United States Ports And Internal Waters Does Not Violate International Law

The court of appeals was also incorrect in concluding that application of Title III to foreign-flagged cruise ships is likely to involve a conflict with customary international law and treaties. Although it failed to cite any specific conflicts, the court presumed (Pet. App. 8a-9a) that Title III's barrier removal requirements are likely to conflict with international standards for "maritime architecture," in particular the International Convention for the Safety of Life at Sea (SOLAS). Based on those presumed potential conflicts with SOLAS, the court applied this Court's statement in *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains," to preclude any application of Title III to foreign-flagged cruise ships.

But applying Title III to a foreign-flagged cruise ship doing business in United States ports would not create any conflicts with SOLAS or any other provision of international law. First, SOLAS itself makes clear that its main objective "is to specify *minimum* standards for the construction, equipment and operation of ships, compatible with their safety." SOLAS, Technical Provisions, 32 U.S.T. 47 (1974) (emphasis added). Nothing in the language, structure or purposes of SOLAS prevents signatory nations from imposing accessibility requirements on ships that enter their ports, any more than it prevents a signatory nation from imposing such requirements on its own vessels. Indeed, because SOLAS applies to *all* passenger ships on international voyages, the logic of the court of appeals' conclusion that application of Title III would pose irreconcilable conflicts with SOLAS could hinder application of Title III even to a U.S.-flagged ship.

Second, both the Department of Justice and the Department of Transportation, while consistently construing the statute to apply to foreign-flagged ships entering United States ports as a general matter, have recognized that Title III should not be applied in a way that conflicts with United States treaty obligations. The Department of Justice, for example, has made clear that foreign-flagged ships "that operate in United States ports may be subject to domestic laws, such as the ADA, *unless there are specific treaty prohibitions that preclude enforcement.*" Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (emphasis added); see 56 Fed. Reg. 45,600 (1991) (Department of Transportation statement that the United States "appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports," except to the extent that enforcing ADA requirements would conflict with a treaty). But there remain substantial applications of Title III that raise no conceivable conflict with treaty obligations.

Third, to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered "readily achievable" within the meaning of Title III. See 42 U.S.C. 12182 (b)(2)(A)(iv); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994). Thus, the requirements of Title III can be readily harmonized with the requirements of SOLAS and other international conventions governing passenger vessels. But far from attempting to harmonize the ADA with SOLAS or other treaties, as this Court's cases require,[4] the court of appeals presumed "potential[] conflict[s]" between Title III's barrier-removal standards and SOLAS without identifying a

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[4] See *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. * * * When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."); accord *Baker* v. *Carr*, 369 U.S. 186, 212 (1962).

single such conflict—presumed or actual. Pet. App. 9a n.6. But the fact that there may be some situations in which barrier removal might not be "readily achievable" does not warrant a holding that Title III is entirely inapplicable to foreign-flagged cruise ships.

Finally, even aside from the flexibility of the "readily achievable" standard, the type of conflicts presumed by the court of appeals are largely, if not entirely, nonexistent. It appears to be undisputed that respondents could remedy many of the violations of Title III alleged here without undertaking any physical alterations to its ships or engendering any conflict with SOLAS or any other provision of international law. It is only with respect to the removal of physical barriers, which constitute only a portion of petitioners' allegations, that there is even an allegation of a potential conflict with treaty obligations.

With regard to barrier removal, the court of appeals noted (Pet. App. 9a n.6) that the Passenger Vessel Access Advisory Committee (PVAAC), a committee established by the Architectural and Transportation Barriers Compliance Board (Access Board) to make recommendations for cruise ship accessibility, see 63 Fed. Reg. 15,175 (1998), issued a report identifying a relatively small number of potential conflicts between recommended revisions to the ADA Accessibility Guidelines (ADAAG) and SOLAS. See PVAAC Report Ch. 13, Pts. I-II, <http://www.access-board.gov/news/pvaac-rept.htm>. The PVAAC Report, however, does not identify the kind of insuperable conflicts envisioned by the court of appeals, and the Access Board has now worked through the issues identified in the Report and has issued a Notice of Availability of Draft Guidelines setting forth Title III accessibility requirements that are fully consistent with SOLAS. 69 Fed. Reg. 69,244 (2004) (draft guidelines <http://www.access-board.gov/pvaac/guidelines.htm#>). The Report, for example, noted that the recommended revisions to the ADAAG guidelines required that in certain situations at least one accessible means of egress be an elevator, whereas SOLAS requires at least two means of egress from certain decks and prohibits elevators from being considered as one of those required means of egress. Those requirements do not present any actual conflict, since a vessel could comply with both by providing an elevator in addition to the other means of egress required by SOLAS, and that is precisely how the draft guidelines resolve the issue. See Draft Passenger Vessel Accessibility Guidelines §§ 207.3, 410.3; see also Int'l Maritime Organization, Maritime Safety Comm. Circular No. 846, Annex § 5.2 (providing that "in emergencies, lifts may be used as an additional means of escape," so long as they have an emergency source of power).

Similarly, the Report noted that the recommended revisions to the ADAAG guidelines limited thresholds at doors required to be accessible to a maximum of 1/2 inch, whereas SOLAS requires coamings of "ample height" to allow doorways to be weathertight. Coamings on cruise ships are typically three to six inches. The Access Board's draft guidelines resolve this issue by, *inter alia*, proposing the use of ramps or removable coamings under certain conditions where non-accessible coaming heights are deemed necessary. See Draft Passenger Vessel Accessibility Guidelines § V404.2; Discussion of Draft Guidelines § V404, *available at* <http://www.access-board.gov/pvaac/guidelines.htm#>.

In its original ADA rulemaking, the Department of Transportation indicated that "[b]efore promulgating any specific requirements affecting foreign-flag ships, the Department would see if any treaty provisions (*e.g.*, provisions of the Convention on Safety of Life at Sea) would conflict with ADA requirements" and "would structure any regulatory requirements to avoid such conflicts." 56 Fed. Reg. 45,600 (1991). As its Advance Notice of Proposed Rulemaking and the Access Board's Notice of Availability of Draft Guidelines demonstrate, the Department is working to finalize acces-

sibility guidelines that are fully consistent with United States treaty obligations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE, LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LTD., JAPAN SHIPOWNERS' MUTUAL P&I ASSOCIATION, LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LTD., NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LTD., SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), STANDARD STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LTD., STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., SVERIGES ANGFARTYGS ASSURANS FORENING, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., AND WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF RESPONDENT

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Ltd., The Japan Shipowners' Mutual P&I Association, The London Steam Ship Owners Mutual Insurance Association Ltd., The North of England Protecting and Indemnity Association Ltd., The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd., The Steamship Mutual Underwriting Association (Bermuda) Ltd., Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., and The West of England Shipowners Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs (collectively referred to here as "*Amici* P&I Clubs") – respectfully submit this brief as *amici curiae* in support of Respondent.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici comprise thirteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I Clubs."). P&I Clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." Grant Gillmore & Charles L. Black, Jr., THE LAW OF

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

ADMIRALTY (2d ed. 1975); see also 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 19-12 (4th ed. 2004) (for the history and function of P&I Clubs); Leslie J. Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); T.G. Coghlin, *Protection & Indemnity Clubs*, 1984 LLOYD'S MAR. & COM. L. Q. 403, 405-11; Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986); Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1 (1991). The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of *amici* are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves are non-profit mutual organizations, insofar as member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, particularly those risks not otherwise covered by a vessel's hull policy. One large class of such liability exposures is those arising from the lack of compliance with international maritime standards, or the laws and regulations of particular port States where vessels may come to call. *Amici* P&I Clubs have a great interest in the substantial uniformity of international maritime law. They are thus desirous to avoid situations where individual port States may (through their national legislation or regulatory schemes) inadvertently establish rules at variance with international standards.

None of the *amici* here have any direct exposure for the risks associated with the Respondent's compliance (or lack thereof) with the Americans with Disabilities Act (ADA), at

least in regard to Petitioners' claims. *Amici* nonetheless have a vital interest in the proper interpretation of the legal standards under which liability may be imposed, whether in the United States or in any other maritime country.

An important policy objective for *amici* is ensuring a system by which national maritime legislation, particularly that affecting the construction, design, equipment and manning of foreign-flagged vessels, is harmonized with international standards. These rules – often referred to by their acronym as "CDEM" regulations – are typically reflected in international maritime law treaties negotiated and adopted by such institutions as the International Maritime Organization (IMO), the specialized U.N. agency (based in London) dedicated to global shipping regulation. The international uniformity of CDEM regulations reflect the obvious fact that no vessel could be expected to sail around the world and comply with each individual nation's (perhaps) eccentric rules about ship structure or configuration.

Amici P&I Clubs carry no brief here as to the policy wisdom of such laudable pieces of legislation as the ADA. Nonetheless, in making their case that the ADA's access requirements ought to be extended to passengers on foreign-flagged cruise vessels, Petitioners (and their *amici*) make a broad-gauge attack against the long-standing and well-supported canon of statutory construction that Congress does not intend to legislate CDEM rules for foreign-registered vessels, absent a clear statement to that effect. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 23 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957); *Incres Steamship Co. v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963). Along the way, Petitioners and their *amici* gratuitously condemn international maritime laws and regulations which have governed ocean shipping for centuries,

as well as the historied prerogative of the State of a vessel's registration (what is known as the "flag State") to manage and control all aspects of that vessel's operations, particularly its compliance with international CDEM regulations. In order to reach the result they desire in this litigation, Petitioners and their *amici* would have this Court repudiate the entire structure of international maritime regulation, in favor of some unspecified regime of unilateral port State control, in which any coastal State has the unbridled authority to legislate rules for the construction, design, equipment and manning of foreign vessels calling at its ports, with no solicitude for international standards. *Amici* P&I Clubs – which, for centuries, have sought to facilitate and promote maritime commerce and the uniformity of international maritime law – are justifiably concerned at such a prospect.

Amici shall leave it to other parties to brief this Court on Congress's precise intent in legislating Title III of the ADA. It seems beyond cavil, however, that Congress expressed no intent to apply access requirements to foreign-flagged vessels. Implicated in this case is the *McCulloch-Benz* canon of presuming that Congress does not intend to legislate for foreign vessels, unless there is a clear statement to that effect. But it is not enough to espouse a substantive canon of statutory construction. To the extent that such presumptions and clear statement rules have embedded within them important policy preferences, it remains to justify them as a matter of continuing jurisprudence. In this submission, *amici* P&I Clubs endeavor to do just that.

SUMMARY OF ARGUMENT

I. This Court has for 150 years consistently applied a clear statement rule that general statutes will not be deemed to

apply to foreign vessels visiting U.S. ports, absent "the affirmative intent of Congress[,] clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957); *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1856). Where this Court has concluded that such statutes do apply to foreign-flagged vessels, there was express language to that effect, or some other clear manifestation of congressional intent. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 119-21 (1923).

The *McCulloch-Benz* canon is particularly relevant where a statute purports to affect a foreign vessel's construction, design, equipment or manning (CDEM). In these situations, this Court has held that Congress must, via a clear statement, expressly apply the statutory scheme where there is "more than a negligible impact on the 'marine operations' of . . . foreign ships." *Windward Shipping (London) Ltd. v. Am. Radio Ass'n*, 415 U.S. 104, 114 (1974) (referencing language in *McCulloch*).

This Court has also rejected attempts to supplant the *McCulloch-Benz* canon with the more inchoate and fact-intensive inquiry of choice-of-law interest analysis, as reflected in such decisions as *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970). Jettisoning a clear statement test in favor of such interest balancing would, in the words of the *McCulloch* Court, "project the courts into application of the sanctions of [statutes] to foreign-flag ships on a purely *ad hoc* weighing of contacts basis," 372 U.S. at 19, and should be avoided.

II. The chief function of the *McCulloch-Benz* canon is to preserve this country's international maritime law obligations, and, for that reason, should not be lightly ignored. International law privileges flag States as the primary (although not exclusive) prescriber and enforcer of international maritime safety rules. *McCulloch*, 372 U.S. at 21; *Lauritzen*, 345 U.S. at 585. This

Court has recognized international standard-setting for maritime operations. See *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 539 (1995); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166-67 (1978). The *McCulloch-Benz* canon ensures that Congress does not inadvertently legislate against these international maritime norms. The canon is also consistent with the clear statement rule that statutes should not be presumed to apply extraterritorially, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), and that Acts of Congress should be construed consistently with this country's international law obligations. *F. Hoffmann-La Roche, Ltd. v. Empagran*, 124 S.Ct. 2359, 2366 (2004).

III. The contrary position of the United States should be given no special deference here. This Court has rejected Executive branch positions as to the application of a statute, where such conflict with established clear statement rules or other statutory construction principles. *McCulloch*, 372 U.S. at 18-20; *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 257-58 (1991).

ARGUMENT

I. The Presumption that Congress Does Not Intend to Legislate for Foreign Vessels in U.S. Ports, Absent a Clear Statement to that Effect, Should be Applied in this Case.

The nub of this case is whether this Court should apply a particular canon of statutory construction as a means of determining congressional intent, in the absence of clear language in Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, applying those provisions to foreign-flagged cruise ships loading and discharging passengers in U.S. ports. That canon is one of a handful of so-called "clear

statement" rules, suggesting that there is no congressional intent to reach certain norms or conduct, absent clear language to that effect. See William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). Clear statement rules have come to be extraordinarily influential in this Court's jurisprudence, patrolling the boundaries of federalism, the separation of powers among the branches of the federal government, and the fulfillment of this nation's international obligations.

The canon against the application of congressional enactments to foreign-flagged vessels in U.S. ports, absent a clear statement to that effect, falls into the last category – intended to effectuate and promote this country's international law responsibilities. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 23 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44, 147 (1957). By virtue of its circumscribed character, as almost a sub-species of broader clear statement rules in foreign relations cases, the *McCulloch-Benz* canon hardly rates as a significant drafting restraint on congressional authority in most cases. But it does figure here, and despite its narrow scope, this presumption of congressional intent effectuates significant foreign policy concerns, as well as the practical operation of U.S. and international maritime law. For these reasons, the canon should be applied here, notwithstanding the grounds raised by Petitioners and their *amici* to disregard it, or to relegate it to obscurity or irrelevance.

A. A Clear Statement Rule for Legislation that Impacts Foreign-Flagged Vessels is Long-Standing and Significant.

Understanding the *McCulloch-Benz* canon begins with the unremarkable observation that it is obviously within

Congress's powers under the Foreign Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, to prescribe whatever rules and regulations it deems appropriate to foreign vessels who ply U.S. waters or call at U.S. ports, so long as they are consistent with the Port Preference Clause, id. art. I, § 9, cl. 6. International law principles of territorial sovereignty and jurisdiction, enshrined in such cases as *The Schooner EXCHANGE v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), are not in question here, and *amici* P&I Clubs harbor no doubt whatsoever that Congress may extend the ADA's access requirements to foreign cruise vessels. But that is not the issue here. Rather, the question is whether – in the face of congressional silence, or (at a minimum) substantial ambiguity as to congressional intent – it is proper for this Court to presume such an intent. Or, as this Court put the matter in *Benz*, "The exercise of that jurisdiction [over foreign vessels] is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. . . . The question here therefore narrows to one of intent of the Congress as to the coverage of the Act." 353 U.S. at 142 (citing *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923)). And, unless "the affirmative intent of Congress [is] clearly expressed," *McCulloch*, 372 U.S. at 22, legislation should not be presumed to reach foreign vessels in U.S. ports or waters.

The *McCulloch-Benz* canon counsels caution and rectitude, a posture that this Court has consistently taken through the years. One striking example of this is in *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1856), where the issue was application of U.S. patent laws to a foreign vessel visiting a U.S. port. The Court first discussed general rules of statutory construction, requiring a contextual reading of an Act in view of congressional intent. See id. at 194. In view of this, the Court concluded that:

> The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the Legislature, nor intended to be granted to the patentee.

> Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. (Id. at 197.)

Nearly 150 years ago, the *Brown* Court articulated the broad contours of this clear statement rule: despite Congress's undoubted powers to regulate foreign vessels, such would not be presumed to be congressional intent, owing to a confluence of a desire to avoid "embarass[ment]" of maritime commerce or "endanger[ment]" of foreign relations, as well as a practical concern of "interfer[ing]" with "foreign ships visiting our ports." Rather, such an intent should be confirmed by clear language, "'a few words would have stated that intention, not leaving such an important regulation to be gathered from implication'." *Benz*, 353 U.S. at 145 (quoting *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918)); *McCulloch*, 372 U.S. at 20 ("We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the

boundaries of the Act as including foreign-flag vessels manned by alien crews.").

This Court has consistently required Congress to express in clear terms an intent to apply legislation to foreign vessels in U.S. ports. See *Patterson v. Eudora*, 190 U.S. 169, 173 (1903) ("When, as here, the statute declares, in plain words, its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel."); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 119-21, 128 (1923) ("In principle, therefore, it is settled that the amendment could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied."). Where this Court has construed an Act to apply to foreign vessels, there was express language of the statute supporting such an interpretation, or some other manifestation of congressional intent for the legislation to so apply.

B. Petitioners' Attempts to Limit the Rationale of the *McCulloch-Benz* Canon Should be Unavailing.

Petitioners and their *amici* raise a host of arguments in order to limit the potential application of the *McCulloch-Benz* clear statement rule for congressional enactments affecting foreign vessels. The cumulative effect of these limiting rationales would be to either reduce the *McCulloch-Benz* canon to the vanishing point of irrelevance, or to repudiate it entirely

in favor of an interest balancing approach that is simultaneously standardless and incoherent. Ironically, all of the limiting grounds advanced by Petitioners have been considered, and rejected, by this Court in its previous decisions. The Court should take this opportunity to reaffirm the *McCulloch-Benz* canon of statutory construction in its original, and robust, form.

1. *The* McCulloch-Benz *canon is not merely employed to avoid sensitive diplomatic disputes.* Petitioner's argument seems to be based on language from *McCulloch* and *Benz*, which describes the issues before the Court as "delicate field[s] of international relations." *McCulloch*, 372 U.S. at 21-22; *Benz*, 353 U.S. at 147. Yet, the *Benz* Court's holding that, "[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action certain," seems ancillary to the "clear statement" rule articulated in that decision. See *Benz*, 353 U.S. at 147.

In *McCulloch*, the Court ruled that where Congress "failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews . . . [there was] no basis for a construction which would exert United States jurisdiction over and apply its laws to the international management and affairs of the vessels [at issue]." *McCulloch*, 372 U.S. at 20. In both *McCulloch* and *Benz*, the Court held that for the judiciary to sanction the exercise of local territorial sovereignty over foreign vessels in U.S. ports, "there must be present the affirmative intention of the Congress clearly expressed." Id. at 21-22; see also *Benz*, 353 U.S. at 147.

For reasons that will be explained in more detail below, see *infra* Part III, to characterize the *McCulloch-Benz* canon as merely a device to serve the interests of the Executive branch in avoiding sensitive diplomatic disputes with other seafaring nations, ignores its role as a means of counseling the extension

of congressional power and authority to regulate foreign commerce under the Constitution. Just as the Executive branch cannot selectively enable or disable the *McCulloch-Benz* canon to serve its ends, neither should the presumption be construed to be limited to situations where diplomatic disputes with other maritime nations are necessarily "evident" and "certain." *Benz*, 353 U.S. at 147.

2. *The* McCulloch-Benz *canon was never intended as a permissive "rule of reason," to be applied in a regulation-by-regulation calculus*. Petitioners and their *amici* suggest that the clear statement rule requiring that Congress expressly apply legislation to foreign-flagged vessels, is best seen in an entirely contextual light, contingent on the nature of the regulation under review. This argument would essentially convert a "clear statement" rule into a highly-nuanced and fact-intensive analysis, dependent on the underlying policy objectives of the subject regulation.

This Court has adamantly rejected such an approach, by no less an authority than the *McCulloch* decision itself. In discussing the nature of orders issued by the National Labor Relations Board – which impacted the crewing operations of foreign vessels – the Court observed:

> [t]o follow such a procedure . . might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis. This would inevitably lead to embarassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore,

> appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen.

McCulloch, 372 U.S. at 19.

This Court should reject Petitioners' overture to alter the fundamental character of the *McCulloch-Benz* canon as a clear statement rule for divining congressional intent. No matter how laudable a statute may be, nor how compelling its public purposes – and *amici* P&I Clubs hardly doubt that such may be true for the ADA – it cannot substitute for "the affirmative intention of Congress[,] clearly expressed." Id. at 22.

3. *The* McCulloch-Benz *canon should not be displaced by Petitioners' proposed interest balancing test*. Petitioners and their *amici* rely on an analytically distinct line of this Court's maritime choice-of-law cases, in order to fashion from whole cloth a competing rule of decision. See Pet. Br. 9, 33-35; U.S. Amicus Br. 24-25; Gutoff Amicus Br. 20-29; Nine Associations Amicus Br. 3-5, 20-21. Of all the arguments made by Petitioners and their *amici*, this poses the gravest threat to the integrity of this Court's maritime jurisprudence and the consistent application of federal statutes to foreign vessels.

Petitioners rely primarily on a series of cases concerning the application of the Jones Act, 46 U.S.C. 688, to a foreign seaman on a foreign vessel, *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953); and a foreign seamen serving on board a foreign-flagged vessel that was nevertheless benefically owned by U.S. citizens. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970). In *Lauritzen*, this Court articulated seven interest balancing factors and concluded that foreign law applied to the seamen's injuries, and the Jones Act did not. 345 U.S. at 592-93. In *Hellenic Lines*, the Court employed the same analysis – even while adding an additional factor (the shipowner's base of

operations) – and concluded that U.S. interests prevailed in the controversy, and that the seamen's employer was covered under the Jones Act. 398 U.S. at 309-10. See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (rejecting application of Jones Act under *Lauritzen* test).

Quite clearly, the *Lauritzen* Court was extending to the maritime choice-of-law context for torts, the same general interest balancing equations that were common for terrestrial choice-of-law determinations, as later reflected in the RESTATEMENT (2D) OF CONFLICT OF LAWS § 6 (1971). Putting aside such questions as the applicability of the *Lauritzen-Rhoditis* test for causes of action not sounding in maritime personal injury, there is an even broader problem with Petitioners' submission. On its own terms, *Lauritzen*'s choice-of-law calculus is inapplicable to situations where there is the threshold issue of whether federal legislation should even be deemed applicable to a foreign vessel. As the Court noted in *Lauritzen*, in the Jones Act

> Congress in 1920 wrote these all-comprehending words [extending its terms to "all employers"], not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.

Lauritzen, 345 U.S. at 577. It can hardly be suggested here that Congress legislated the ADA in such a manner.

In short, the *Lauritzen-Hellenic* line of cases were never intended by this Court to "erase longstanding principles of comity and accommodation in international maritime trade."

Windward Shipping (London) Ltd. v. Am. Radio Ass'n, 415 U.S. 104, 112-13 (1974) (referring to NLRA). Or, as this Court put it in *Romero*, "[i]n the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." 358 U.S. at 382-83; see also *Hellenic Lines*, 398 U.S. at 312-14 (Harlan, J., dissenting).

This Court has already rejected the proposition that a conflicts-of-law test, featuring interest balancing, should supplant the anterior analysis of whether Congress even intended general legislation to apply to foreign vessels. As noted in *McCulloch*, "enforcement of [such statutes against foreign-flagged vessels] would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis." 372 U.S. at 19. *McCulloch*, handed down after *Lauritzen*, manifestly contemplated that the clear statement test for congressional intent in the maritime field would be applied *before* any weighing of contacts or interests. The *Lauritzen-Hellenic Lines* interest balancing test is simply irrelevant where a statute has already been deemed, under the *McCulloch-Benz* canon, to be inapplicable to foreign vessels. To entertain any other result would mean that the application of U.S. statutes to a particular foreign vessel will turn on a host of fact-intensive inquiries, impervious to a general rule of decision. The *McCulloch-Benz* canon was intended as a way to avoid such confusion, which would be so debilitating for the uniform application of maritime regulations to ships engaged in trade.

4. *The* McCulloch-Benz *canon applies to the "maritime operations" of foreign vessels, including their construction, design, equipment and manning.* The last assault Petitioners and

their *amici* make on the *McCulloch-Benz* canon is an attempt to limit its applicability to only U.S. laws affecting foreign crews, and not to rules concerning passenger comfort and safety. See Pet. Br. 9, 33, 36-39; U.S. Amicus Br. 21-25. *Amici* P&I Clubs will leave it to other parties to explain the direct impact Title III of the ADA will have on passenger cruise line operations. The important issue for the Court's consideration, though, is whether the *McCulloch-Benz* canon should be artificially limited to only those statutes affecting the internal management and affairs of foreign vessels bearing on crews, while ignoring the effects of such regulatory regimes on the construction, design and equipment of the vessel.

The *McCulloch* Court observed that "we find no basis for [an interpretation] which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department but also by the Congress. In addition, our attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch*, 372 U.S. at 20 (citing *Wildenhus's Case*, 120 U.S. 1, 12 (1887); Colombos, THE INTERNATIONAL LAW OF THE SEA 222-23 (3d rev. ed. 1954)). *McCulloch* also repeatedly emphasized a slightly wider objective of protecting the "maritime operations" of foreign vessels from unnecessary and chaffing U.S. regulatory interference. See id. at 13 ("We have concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen."), 14; see also *Incres*, 372 U.S. at 27.

Indeed, in later decisions of this Court, the potential impact of a U.S. statute on a vessel's "maritime operations" was the relevant trigger for the application of the *McCulloch-Benz* clear statement rule. It was no surprise, therefore, that in a series

of cases involving unionized longshoremen picketing foreign vessels off-loading cargoes at U.S. ports, this Court found that the *McCulloch-Benz* canon was not relevant because the vessel's maritime operations were not implicated. *Int'l Longshoremens' Ass'n v. Allied Int'l Inc.*, 456 U.S. 212, 221 (1982) (boycott did not aim to alter terms of employment of foreign crews); *Int'l Longshoremens' Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (foreign vessels employed U.S. citizens to perform short-term longshore work).

But in another set of cases, largely overlooked by Petitioners and their *amici*, this Court held the *McCulloch-Benz* canon was triggered where picketing of foreign vessels was intended to call attention to the low wages paid to foreign seamen, and thus had "more than a negligible impact on the 'maritime operations' of these foreign ships." *Windward Shipping*, 415 U.S. at 114; *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 221-25 (1974). Summarizing the impacts on "maritime operations" for the foreign vessels and their owners, the *Windward Shipping* Court, then-Justice Rehnquist writing, observed:

> In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would

probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate. This case therefore, falls under *Benz* rather than under *Ariadne*. (415 U.S. at 114-15.)

Title III of the ADA should likewise be viewed under the lense of *Windward Shipping*'s "more than a negligible impact on the 'maritime operations' of . . . foreign ships" standard. Id. at 114. Just as this Court has given a wide ambit to "maritime operations" in the context of establishing admiralty jurisdiction over maritime contracts, see *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 394 (2004) (quoting *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989)), and for maritime torts, see *Grubart v. Great Lakes Dredge Co.*, 513 U.S. 527, 540 (1995), so too should it be regarded insofar as the *McCulloch-Benz* canon is concerned.

II. The *McCulloch-Benz* Presumption Gives Effect to U.S. International Maritime Obligations, and Prevents Inadvertent Legislation Regarding Foreign Vessel Construction, Design, Equipment and Manning.

In addition to casting doubt on the propriety of the *McCulloch-Benz* canon, Petitioners and their *amici* also disparage the nature and content of such international maritime law norms as deference to the flag State for regulation of vessel construction, design and equipment, as well as restrictions on the ability of nations to unilaterally impose CDEM regulations in excess of international standards. To say the least, most of these criticisms are unjustified, and quite beside the point of this case – the proper construction of the ADA in light of the *McCulloch-Benz* canon. *Amici* P&I Clubs submit that the most important purpose of the *McCulloch-Benz* clear statement rule is to facilitate the accomplishment of the United States' international maritime law obligations, a goal certainly worthy of a nation with a great seafaring tradition and dependence on ocean trade.

A. International Maritime Law Limits Port States from Unilaterally Imposing CDEM Regulations Exceeding Global Standards.

As reflected in the *McCulloch-Benz* line of decisions, and their precursors, it has long been an article of faith in U.S. maritime practice that flag States have the principal competence to prescribe, monitor and enforce international vessel safety norms for their ships. See *McCulloch*, 372 U.S. at 21 ("the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"); *Wildenhus*, 120 U.S. at 12 ("And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require."); *Lauritzen*, 345 U.S. at 585 ("the law of the flag [is used] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.").

Contemporary international law prescribes substantial duties for flag States. According to the 1958 Geneva Convention on the High Seas, to which the United States is a party, "[e]very State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to . . . [t]he construction, equipment and seaworthiness of ships,"

and "[i]n taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance." Apr. 29, 1958, art. 10, 13 U.S.T. 2312, 450 U.N.T.S. 82;[2] see also RESTATEMENT (3D) FOREIGN RELATIONS LAW § 502 (1987).

None of this is to suggest, however, that port States have no role to play in the enforcement of international CDEM standards, even as regards to foreign vessels. Congress has, by statute, prescribed that foreign vessels visiting U.S. ports must be in compliance with such International Maritime Organization instruments as the Convention on Safety of Life at Sea (SOLAS), see 46 U.S.C. 3505, and the Convention on the Prevention of Marine Pollution (MARPOL), see 33 U.S.C. 1904(c) & (d). The significance of these Acts is that, first, Congress expressly legislated for foreign-flagged vessels (thus satisfying the *McCulloch-Benz* canon), and, second, that the United States was only imposing on foreign vessels

[2] These provisions are substantially elaborated in the U.N. Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 397, 21 International Legal Materials 1261 (1982). See id. arts. 94(3)(a) (flag State duties); 217(2) (flag State has duty to establish CDEM regulations); 21(2) (restricting ability of coastal State to unilaterally impose CDEM regulations in excess of international standards on vessels within territorial seas); 194(3)(b) (delegating to relevant international institutions, including the IMO, the power to establish global CDEM regulations to prevent marine pollution); 211(6)(c) (restricting ability of coastal States to prescribe anti-pollution CDEM regulations in excess of international standards). The United States has signed UNCLOS, although the treaty has not yet received advice and consent by the Senate. In any event, the above-cited provisions have been regarded by the U.S. government as reflecting pre-existing customary international law.

internationally-established CDEM regulations. The essence of port State control is to provide additional means of inspecting vessels and enforcing already agreed international norms. See RESTATEMENT (3D) FOREIGN RELATIONS LAW § 512, cmt. c. *Amici* P&I Clubs fully subscribe to this role for port and coastal States in the improvement of global shipping rules. In the same fashion, *amici* support continued improvements for the private law role played by marine insurers and Classification Societies (certification bodies which regularly inspect vessels, often as a condition of insurability) in guaranteeing the highest standards of vessel operation and safety.

These considerations of flag State primacy should even apply in the context of vessels flagged in open registries, or so-called "flags of convenience." International law requires a genuine link between the vessel, its owners and operators, and the flag State. See Geneva Convention on the High Seas, *supra*, art. 5(1) ("There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."); RESTATEMENT (3D) FOREIGN RELATIONS LAW § 501, cmt. b. This Court has recognized the role of a flag State, even an open registry, in managing the maritime operations of a vessel. See *Lauritzen*, 345 U.S. at 584 ("Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.").

The argument propounded here by Petitioners and their *amici* is really an attempt to subvert the balance between flag

State and port State authority over vessel construction, design and equipment standards, and to give *carte blanche* to coastal States in unilaterally legislating at variance with international maritime rules. And while *amici* P&I Clubs do not doubt that Congress has the power to adopt legislation that, while conflicting with U.S. maritime treaty obligations, would still have domestic effect, at a minimum the *McCulloch-Benz* canon of statutory construction is intended to ensure that Congress does not legislate in regards to foreign vessels in an inadvertent or unintentioned manner.

This Court has consistently indicated that it is prepared to interpret both federal and state statutes agreeably with international maritime law standards. In *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995), Justice Kennedy, writing for the Court in a case involving arbitration of marine cargo disputes, noted that "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." Id. at 539. Specifically in the context of vessel CDEM regulations, this Court has observed that there is "a decided congressional preference for arriving at international standards for building tank vessels." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166-67 (1978) (citing and quoting congressional statements to that effect); see also *United States v. Locke*, 529 U.S. 89, 102-03 (2000) (considering, without deciding, effect of U.S. treaty obligations on vessel CDEM regulations in preempting contrary state law). This Court should, in this case, extend the same solicitude to international maritime treaties by properly applying the *McCulloch-Benz* canon to the ADA.

B. The *McCulloch-Benz* Canon is a Natural Corollary to the Presumption Against Extraterritorial Application of U.S. Law.

In rendering its decision, the court of appeals below considered another clear statement rule, stipulating that Congress is not presumed to legislate extraterritorially, unless such intent is manifestly indicated in the text of the Act. Known as the *Foley* presumption, from its primary articulation by this Court in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), this presumption is analytically distinct from the *McCulloch-Benz* canon. Nonetheless, the court below ruled that insofar as Title III of the ADA imposed CDEM requirements on foreign vessels calling at U.S. ports, requiring substantial construction and equipment alterations, such rules would have extraterritorial effect as soon as the subject vessel left U.S. waters. See Pet. App. 11a.

Amici P&I Clubs believe that this case can be properly decided within the contours of the *McCulloch-Benz* canon, and this Court need not opine as to the broader extraterritorial effects of the ADA. Nevertheless, it is worth noting that the *Foley* presumption is logically related to the *McCulloch-Benz* canon, and so may remain relevant as a background clear statement rule, reflecting this Court's desire to protect against "unintended clashes between our laws and those of other nations which could result in international discord." *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991).

This Court has showed increasing sensitivity to the interests of other nations with the development of the *Foley* presumption and the *McCulloch-Benz* canon. In *Foley*, this Court declined to apply the Eight Hour Act to work conducted in foreign countries in the absence of any clear statutory language suggesting that Congress intended to apply the Act

extraterritorially. See 336 U.S. at 284-85. In so doing, the *Foley* Court articulated a presumption against extraterritoriality, stating that Congress is assumed to be concerned primarily with domestic matters and therefore, "unless a contrary intent appears, [legislation of Congress] is meant to apply only within the territorial jurisdiction of the United States." Id. at 285; see also id. at 292 (courts should not, "in the absence of an explicit declaration of policy, assume that Congress meant to impose . . . domestic standards. . . upon peoples who are not generally subject to the regulatory power of Congress.") (Frankfurter, J., concurring); *Smith v. United States,* 507 U.S. 197, 204 n.5 (1993) ("Congress generally legislates with domestic concerns in mind."). The *Foley* doctrine suggests that, absent a clear statement of affirmative intent, Congress is presumed *not* to apply legislation extraterritorially or upon persons who are not normally subject to its laws merely because it may have the power to do so.

As in *Foley*, the *McCulloch-Benz* canon emphasizes that, absent an express and affirmative statement by Congress to do so, the Court should forego broad application of U.S. laws to foreign vessels, in order to minimize international discord. *Benz,* 353 U.S. at 142-43.

> It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of the Congress as to the coverage of the Act. The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. . . .It may well be that American laws should not be construed to apply, without some more explicit Congressional

> indication than we are able to find in the [NLRA], as amended, to situations with as many points of foreign contact as the situation at bar.

Id.; see also id. at 147 n.7 (citing *Brown v. Duchesne,* 60 U.S. 183, 197 (1857) ("laws. . . should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish")).

C. Statutes should be read consistently with U.S. obligations under international maritime law.

There is one final canon of statutory construction that can inform the Court's judgment here. The *Charming Betsy* principle – the name being derived from the *locus classicus* of the doctrine -- counsels that Acts of Congress should be construed, wherever possible, consistent with this country's international obligations. The *Charming Betsy* rule is a statutory tool of construction that is distinct from the presumption against extraterritoriality and the *McCulloch-Benz* canon. See *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that "[the *Charming Betsy*] canon is 'wholly independent' of the presumption against extraterritoriality"). Operation of this principle ensures against inadvertent abrogations of U.S. obligations under its treaties and customary international law.

Since the early nineteenth century, this Court has recognized that acts of Congress are "never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The CHARMING BETSY,* 6 U.S. (2 Cranch) 64, 118 (1804); *Weinberger v. Rossi,* 456 U.S. 25, 32 (1982) (applying the *Charming Betsy* canon to narrowly interpret a federal statute in deference to an executive agreement between

the United States and the Philippines). Statutes must be construed in accord with international obligations absent a clear and affirmative expression of Congressional intent to the contrary. Id. at 35. Statutory ambiguity or silence is insufficient to abrogate an international obligation. Id. ("ambiguous . . . meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in . . . international agreements"); *Trans World Airlines, Inc. v. Franklin Mint Corp.* 466 U.S. 243, 252 (1984) (citing *Cook v. United States*, 288 U.S. 102, 120 (1933) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'")).

The *Charming Betsy* doctrine has clear relevance to cases involving the application of general statutes to foreign ships. See *McCulloch,* 372 U.S. at 21 (applying the *Charming Betsy* canon to restrict application of the NLRA to foreign-flag vessels). In maritime law, this Court has consistently construed "generally worded statutes . . . in light of international law." *Hartford Fire Ins.*, 509 U.S. at 816 (Scalia, J., dissenting) (citing *Lauritzen, Romero,* and *McCulloch*).

More recently, in *F. Hoffmann-La Roche, Ltd. v. Empagran,* 124 S.Ct. 2359 (2004), this Court articulated the rationale behind the *Charming Betsy* canon, emphasizing the need to avoid international conflict with domestic law.

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's

> highly interdependent commercial world. (Id. at 2366.)

Then, in a passage as revealing in its citations as its content, it was noted that

> this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); *Lauritzen v. Larsen,* 345 U.S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow. (Id.)

Quite clearly, while the Court has acknowledged that the *McCulloch-Benz* and *Charming Betsy* canons are separate and distinct – operating in somewhat different spheres – they nonetheless serve the same important object and purpose.

III. The *McCulloch-Benz* Canon Should be Applied, Notwithstanding the Executive Branch's Selective Position.

Amici P&I Clubs acknowledge that the United States has taken a position contrary to that advanced here. Nevertheless, there are compelling reasons for this Court not to extend to the United States' position any special deference. The United States' veiled argument, U.S. Amicus Br. 14-15, to apply some version of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), is especially inappropriate and ill-advised.

First, informal administrative opinions, such as the PVAAC guidelines (relied upon by Petitioners), are entitled to

little weight, and certainly not *Chevron* deference. Agency "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade'." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *ARAMCO*, 499 U.S. at 256-58).

More significantly, *Chevron* deference cannot be deployed to overcome a clear statement rule, such as the *McCulloch-Benz* canon. "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be 'clearly expressed,' it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done." *ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring).

This Court has previously rejected agency interpretations that conflict with maritime and international law obligations. *ARAMCO*, 499 U.S. at 257-58 (finding that EEOC's interpretation of Title VII is "insufficiently weighty to overcome the presumption against extraterritorial application"); *McCulloch*, 372 U.S. at 18 (refusing to defer to the NLRB's interpretation that the NLRA should apply to foreign vessels, where the Act lacked a clear expression of affirmative intent to contravene international law). In *McCulloch*, this Court observed that the NLRB's statutory construction conflicted with the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." Id. at

21. In refusing to defer to the agency's statutory interpretation, this Court emphasized that Acts of Congress must be interpreted principally in accordance with international obligations. Id. ("questions of such international import would remain as to invite retaliatory action from other nations . . . .").

As already discussed, the *McCulloch-Benz* canon should not be applied as a surrogate for the Executive branch's situational position in a particular case, or in regards to a particular statutory provision. Rather, the canon ensures that Congress is counseled to legislate in a manner consistent with international maritime law, pursuant to its power under the Foreign Commerce Clause, and mindful of the uniformity and federalism limitations inherent in such provisions as the Port Preference Clause. See *MacLeod v United States*, 229 U.S. 416, 434 (1913) ("statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law."). In short, the *McCulloch-Benz* canon recognizes the boundary of Presidential and Congressional control over issues of maritime commerce, and should not be lightly ignored simply because the Executive Branch adopts an informal position in a particular controversy.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 28, 2005[3]

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No. 03-1388

In the Supreme Court of the United States

DOUGLAS SPECTOR, ET AL.,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Petitioners' position in this case causes serious concern to *amicus* and its members, many of which—as did respondent in this case—choose for good and legitimate reasons to subject themselves to regulation by a foreign sovereign rather than by the United States. Those decisions are no different in kind from decisions businesses make daily throughout the United States about where to situate a corporate headquarters, in which State to incorporate, and what corporate structure to adopt. Like those domestic decisions, international business decisions—including where to incorporate and where to register a ship—take into account tax consequences and other regulatory incentives, as well as non-regulatory factors such as the locations of suppliers and customers and the cost of transport. All of these are fully permissible and legal bases for corporate decision-

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

making. If petitioners' proposed rule is adopted, permitting the application of Title III of the Americans with Disabilities Act (ADA) to foreign ships without affirmative evidence of Congress's intent to apply that statute to entities primarily governed by a different legal regime, a passenger—whether or not a U.S. citizen—could sue a cruise line for an ADA violation if even one ship of its line ever docked in the United States.

Members of *amicus* Chamber also include foreign-owned and foreign-based businesses that have chosen to conduct a substantial portion of their operations in the United States, and thereby to subject themselves to U.S. regulation, in some instances to the exclusion of regulation by their home nation. If the rule of extraterritorial application advanced by petitioners and their *amici* is adopted, foreign countries that have forgone regulating business conduct in deference to U.S. regulation would be encouraged to retaliate against perceived U.S. aggression by likewise enforcing their laws and regulations extraterritorially.

Amicus urges this Court to apply in this case a rule that recognizes its members' legitimate business interest in being subjected to reasonable, predictable, and non-redundant regulation. *Amicus* believes that its and its members' interests are protected by the rule of statutory interpretation this Court long has applied and that Congress long has understood: *domestic* legislation is presumed to apply *domestically*; and an intent to legislate *extraterritorially* must therefore be made express. Such a rule respects the sovereignty of foreign countries and, by giving effect to choices made by multinational businesses, permits those businesses to order their affairs understanding the rules to which they will be subjected.

STATEMENT

This case presents a simple question of a type that this Court many times has addressed in related contexts: whether, as a matter of statutory construction, Congress chose to exercise its power to apply Title III of the ADA, 42 U.S.C. § 12181 *et seq.*, extraterritorially. Petitioners and their *amici* confuse the issue

by citing and discussing authorities considering the distinct question whether Congress *has the power* to regulate extraterritorially. But, as in most cases, the proper resolution of this case depends on correctly understanding what is at issue.

This case presents far greater ramifications than the consequences to respondent's business should it be required to retrofit the bulk of its cruise fleet in order to continue serving the U.S. market. This case carries like implications for myriad companies that, like respondent, "for reasons satisfactory to [themselves]" (*Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 336 (1925)) have chosen to subject some portion of their business to regulation by a foreign sovereign, rather than by the United States. And, like a large and increasing percentage of the federal courts' dockets, this case raises sensitive issues of foreign relations with nations, like the Bahamas, that have enduring positive relationships with the U.S. government and are strong trading partners with this Nation.

A. Global Forum Shopping and Canons of Construction

Increasingly in recent years, plaintiffs have sought the advantages of litigating in U.S. courts issues that might more appropriately be addressed by the authorities of other countries. The U.S. forum is particularly attractive for many reasons. Our legal system offers such plaintiff-friendly features as jury trials, class actions, punitive-damage awards, and attorneys'-fee awards, which are procedural devices not universally employed in other nations' systems. By suing in the United States, plaintiffs gain the advantages of U.S. procedures that likely would not be available to them in a different and perhaps more appropriate forum. Moreover, the federal and many state governments have enacted substantive laws, reflecting political and social policies of interest to their respective electorates, creating causes of action that other sovereign nations—as a matter of their own assessment of competing policies—may have chosen not to endorse. Plaintiffs' exercises in global forum shopping—whether to obtain the benefit of U.S.

procedures or to insist on extraterritorial application of U.S. policies—make litigation one of this Nation's hottest exports.

In many instances, legislative bodies may consider whether to apply their social policies beyond their borders to protect their own citizens in matters that touch on two or more nations. Issues of legislative *power* aside, the question always arises whether the legislature *has in fact chosen* to give the legislation the extraterritorial effect claimed for it. And analysis of that question is advanced not one whit by pious pronouncements about how important the policy objective of the legislation is or by false pretenses that the beneficiaries of the legislation will be left "unprotected" if they have to look to a different sovereign to protect them. Such arguments may have rhetorical appeal but are distractions from the real issue before the Court.

This Court has noted the importance of helping "the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-LaRoche Ltd.*-v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004). Under this Court's case law, that harmony is achieved by respecting principles of "prescriptive comity"—that is, by "constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Ibid.*

The "presumption against extraterritoriality" (*EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*ARAMCO*)) has therefore become firmly ensconced in this Court's jurisprudence. Grounded in an appreciation of courts' limited foreign policy expertise, the presumption recognizes "'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Ibid.* (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). The Court also repeatedly has affirmed the canon of construction that an Act of Congress will not be interpreted to violate customary international law, unless there is no possible alternative interpretation. These canons are

central to the proper interpretation of Title III of the ADA in this case, and thus to the proper resolution of this case.

B. Title III of the ADA

Title III—with which affected members of *amicus* make every effort to comply in their domestic operations—proscribes discrimination on the basis of disability by owners or operators of places of public accommodation. 42 U.S.C. § 12182(a). Compliance with the law requires regulated entities to make permanent changes—"remove architectural barriers * * * that are structural in nature"—to existing facilities if those changes are "readily achievable." *Id.* § 12182(b)(2)(A)(iv). Something is "readily achievable," in turn, if it is "easily accomplishable and able to be carried out without much difficulty or expense." *Id.* § 12181(9).

The Department of Transportation (DOT) is required to issue regulations stating standards for compliance with "the various transportation provisions of the statute, including § 12184." Pet. App. 36a (citing 42 U.S.C. § 12186(a)). Likewise, the Department of Justice (DOJ) "is required to issue regulations carrying out the remaining provisions of Title III." Pet. App. 36a (citing 42 U.S.C. § 12186(b)). By statute, all such regulations were to be promulgated "[n]ot later than 1 year after July 26, 1990." 42 U.S.C. § 12186(a)(1); *id.* § 12186(b)(1). Despite Congress's express instruction, from the enactment of the ADA in 1990 through the entire pendency of this litigation in the lower courts, neither DOJ nor DOT had issued regulations for cruise ships, although both expressed their beliefs that cruise ships were subject to the ADA. Pet. App. 13a. Finally, on November 26, 2004—13 years and four months after the time for doing so had expired, and nearly two months after the grant of certiorari in this case—DOT published draft guidelines for cruise ships. U.S. Br. 5.

Congress enacted the ADA "to provide a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)

(emphasis added). The congressional findings note that "some 43,000,000 *Americans* have one or more physical or mental disabilities" (*id.* § 12101(a)(1) (emphasis added)) and that "census data [and] national polls" provide support for the decision to regulate in this arena (*id.* § 12101(a)(6)). Also, "the *Nation*'s proper goals regarding individuals with disabilities are to assure equality of opportunity," with the possible benefit of saving "the *United States* billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(8), (9) (emphases added). Nowhere throughout the ADA, Title III in particular, or the legislative history of the Act is there any discussion that Congress was tackling a *world-wide* concern about discrimination against individuals with disabilities.

C. The Proceedings Below

Petitioners took cruises on Bahamian-flagged ships of respondent's line and then sued respondent, a Bermudian corporation, in U.S. District Court. Petitioners claimed that they, and purported classes of similarly situated individuals, had been discriminated against when vacationing on respondent's cruise ships—some as mobility-impaired persons allegedly unable to access portions of the cruise ships and participate in some of the on-board activities, and some as companions of the mobility-impaired persons allegedly discriminated against because of their association with the other plaintiffs. Pet. App. 16a-18a. Although petitioners alleged that respondent's ships were flagged in the Bahamas (J.A. 10), although respondent itself was incorporated under the laws of Bermuda, and although the discrimination petitioners alleged took place outside U.S. territorial waters as well as within, petitioners did not allege that respondent had violated Bahamian law—or any law other than that of the United States (see J.A. 8-17).

1. Respondent moved to dismiss the complaint, and the district court granted the motion in part and denied it in part. Pet. App. 16a. The district court held that the unavailability of regulations instructing cruise lines *how* to comply with the

barrier-removal provisions of Title III on cruise ships—eleven years after Congress instructed DOT to issue regulations—precluded the suit against respondent for discriminating against mobility-impaired persons in violation of Section 12182 by failing to alter existing ships to remove barriers. Pet. App. 42a ("Though they have had over eleven years to do so, DOJ and DOT have failed to fulfill their duty to provide guidance to the owners of cruise ships and other passenger vessels.").[2] Petitioners' claims seeking changes to respondent's ships were therefore dismissed. *Ibid.*

In reliance on the Eleventh Circuit's holding in *Stevens* v. *Premier Cruise Lines*, 215 F.3d 1237 (11th Cir. 2000) (*per curiam*), amended on denial of reh'g, 284 F.3d 1187 (11th Cir. 2002), that the ADA regulates extraterritorially, the district court did not dismiss petitioners' other claims—for example, that respondent charged higher fees to petitioners because of their or their companions' disabilities. Pet. App. 28a, 35a. The court certified its rulings for interlocutory appeal.

2. Unanimously holding that the complaint should have been dismissed in its entirety because Congress, when enacting the ADA, did not "clearly express its intention" to "subject foreign-flagged cruise ships to [the] dictates" of the statute, the court of appeals affirmed in part and reversed in part. Pet. App. 14a-15a. The court of appeals engaged in a careful analysis of this Court's authorities dealing with extraterritorial application of federal statutes. In so doing, the court correctly identified the crux of the issue in this case, which the Eleventh Circuit in

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[2] The agencies argued that the district court should apply guidelines promulgated for other facilities, in the absence of regulations directed to cruise ships, although the agencies' interpretation of the existing regulations expressly declined to apply them to cruise ships. See Pet. App. 39a. As the district court noted, this argument asked the district court to fail to accord deference to the agencies' interpretation of their own regulations, where deference is required, and to defer instead to the agencies' litigation position in this case. The district court declined to follow that suggestion. *Id.* at 39a-40a.

Stevens, the district court in following *Stevens*, and petitioners and their *amici* all have missed.

Although "[i]t is settled that 'a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country'" (Pet. App. 4a (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)), "the local sovereign is under no obligation to exercise its authority to the outer limits of its jurisdictional reach" (Pet. App. 4a (citing *Benz*, 353 U.S. at 142)). Thus, the court of appeals held, the issue is not whether Congress *could* require all cruise ships docking at the Port of Houston and taking on U.S. passengers to comply with the ADA; the question is whether Congress has "'clearly expressed'" an "'affirmative intention'" to do so. Pet. App. 4a-5a (quoting *Benz*, 353 U.S. at 147). "Under the Supreme Court's framework, Congress may enact legislation that governs foreign-flagged cruise ships operating within United States waters, but it must clearly indicate its intention to do so." Pet. App. 8a. "Absent an affirmative intention, 'such appeal should be directed to the Congress rather than the courts.'" Pet. App. 5a (quoting *Benz*, 353 U.S. at 147).

Thus understanding the issue, the court engaged in straightforward statutory interpretation of the ADA, assuming—as this Court numerous times has instructed courts to do—that "'Congress legislates against the backdrop of the presumption against extraterritoriality.'" Pet. App. 6a (quoting *ARAMCO*, 499 U.S. at 248). Applying the presumption, the court of appeals looked throughout the statute and its "extensive legislative history" for the required clear statement of Congress's intent to apply the statute extraterritorially, but found "no indication" of such an intent. Pet. App. 8a. The only indication argued by plaintiffs was that the ADA was intended to have a "broad reach," but the same "broad reach" in Title VII had been an insufficiently clear expression of intent in *ARAMCO*. Pet. App. 12a-13a. And *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923), holding that the National Prohibition Act applied to foreign vessels while in U.S. territorial waters, was distinguishable for two reasons. First, the Court in that case interpreted express statutory language that was clear in its intent to regulate conduct on all vessels in U.S. territorial waters. Pet. App. 10a. Second, unlike this case, in which plaintiffs' hoped-for solution required permanent changes, the effect of the enactment at issue in *Cunard* was limited to U.S. territorial waters, and did not regulate foreign ships outside those waters. *Ibid.*

The court rejected as "unpersuasive" the Eleventh Circuit's prior contrary conclusion in *Stevens*. Pet. App. 12a. It understood that court to have interpreted Congress's silence about whether the statute applied to foreign cruise ships to mean that Title III *was* applicable—thereby ignoring the requirement that Congress "clearly express its intent." *Id.* (citing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963)). And, contrary to the *Stevens* court's analysis, *Benz*, 353 U.S. 138, and *McCulloch*, 372 U.S. 10, were not distinguishable because those cases dealt with rules affecting the "internal management and affairs" of the ship. The court of appeals noted that plaintiffs' arguments called for structural changes to the ship and changes to the responsibilities and procedures of the crew—precisely the sort of "internal management and affairs" that implicate concerns about the flag state's privilege and responsibility to regulate.[3]

SUMMARY OF ARGUMENT

At bottom, this case requires a simple exercise of statutory interpretation—a responsibility that the court of appeals below undertook carefully and correctly and that the Eleventh Circuit in *Stevens* and the district court essentially abdicated. The solu-

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[3] The court of appeals also refused to accord any deference to DOJ's and DOT's opinions, presented in "technical assistance manuals and public comments, not formal adjudications or rulemaking." Pet. App. 13a. "These informal administrative opinions are not entitled to *Chevron* deference." *Ibid.* (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

tion to this case is reached by applying time-tested and well-understood canons of statutory construction to the ADA.

I. Petitioners and their *amici* confuse the issue by misstating the relevant analysis. Arguments that Congress has the power to apply the ADA extraterritorially, or that Congress has legislated with that effect in the past, are beside the point. The essential question is whether Congress exercised that power in this statute.

The presumption against extraterritoriality is a fundamental canon of construction that this Court has applied numerous times, sometimes in settings closely comparable to this case. Its application is simple: it requires courts to inquire whether Congress has "clearly expressed" its "affirmative intention" (*Benz*, 353 U.S. at 147) that an enactment apply extraterrorially. If not, the enactment is presumed to have only domestic effect. In this case, nothing about the ADA or its legislative history overcomes the presumption. As the court of appeals below noted, neither Congress's silence, nor the simple indication of the ADA's "broad reach," qualifies as a clear expression of intent. Pet. App. 12a. A distinct canon—which presumes that Congress does not legislate in violation of customary international law—also applies. Regulations touching on the internal management and affairs of a foreign ship, such as architectural features of the ship, its equipping, and crewing requirements, are left by customary international law to the flag state to promulgate or not, as it sees fit. Unless Congress clearly manifests its intent to the contrary, domestic legislation does not reach so far.

Petitioners' argument that they seek only to apply the ADA to ships in U.S. territorial waters does not change the analysis. A foreign ship is considered an extension of the foreign sovereign; wherever the ship travels, matters relating to its internal management and affairs are matters of foreign sovereign concern. Consistent application of this rule is important to prevent patchwork and redundant regulatory burdens from impinging on seaborne commerce and to prevent re-

taliation by foreign sovereigns faced with aggressive U.S. regulation. Nothing petitioners or their *amici* say overcomes the rule that the flag state has the privilege and responsibility of regulating its vessels.

II. Business decisions made by companies, whether foreign or domestic, about which flag to fly are valid decisions that responsible companies make all the time. The U.S. federal government—which undeniably has the power, should it choose to exercise it, to ban ships of a particular registry from U.S. waters—has demonstrated its approval of the Bahamian registry through statutory enactments, administrative rulemakings, and informal procedures that all reflect its view of the registry's reliability as a watchdog for safety and security concerns. Respondent's decision and decisions by other companies to fly the Bahamian flag or other foreign flags on ships of their lines are entitled to deference. In no way do these choices of registries alter this Court's interpretation of the ADA.

ARGUMENT

"When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). To resolve this case, the Court need look no further than well-understood and long-applied canons of statutory construction. Despite this Court's repeated reaffirmation of "the presumption against extraterritoriality" (*ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring)), by which this Court "presume[s legislation] 'is primarily concerned with domestic conditions'" (*id.* at 248 (opinion of the Court) (quoting *Foley Bros.*, 336 U.S. at 285)), petitioners contend that congressional silence provides justification for applying Title III of the ADA to foreign ships. But Congress knew in 1990 what it must do to legislate extraterritorially, and it nonetheless enacted the ADA without any indication—let alone the kind of "'affirmative intention * * * clearly expressed'" (*ARAMCO*, 499 U.S. at 248 (quoting *Benz*, 353 U.S. at 147))—that would justify the interpretation petitioners urge. Petitioners' interpretation also ignores the

canon of construction that "Congress is generally presumed not to have exceeded [the] customary international-law limits on jurisdiction to prescribe." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). By holding that Title III of the ADA does not apply to foreign cruise ships, the court of appeals below reached the correct result and should be affirmed.

I. Petitioners and Their *Amici* Fundamentally Misstate the Relevant Analysis, Which Asks Whether Congress Intended to Apply the ADA Extraterritorially, Not Whether Congress Has the Power to Do So

The court of appeals below assumed that Congress has the power to subject foreign ships to U.S. regulations, including Title III of the ADA, but noted that the issue was whether Congress had done so. Pet. App. 4a. Petitioners and their *amici* mostly sidestep the relevant question.

1. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *ARAMCO*, 499 U.S. at 248 (internal citation omitted) (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz*, 353 U.S. at 147). Justice Scalia recently noted these principles in concurrence: "[S]tatutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories." *F. Hoffmann-LaRoche* v. *Empagran*, 124 S. Ct. at 2373.

Applying the *ARAMCO* presumption in this case compels the conclusion that the court of appeals was absolutely correct. Searching the text and the legislative history of the ADA

produces no indication that Congress ever considered that the statute might apply to foreign vessels, whether within or outside U.S. territorial waters. Indeed, as respondent has noted throughout this litigation, "[a]lthough the statute contains a lengthy and exhaustive list of 'public accommodations' and 'specified public transportation,' it does not even mention ships, let alone foreign-flagged ships. Moreover, nowhere in the 3000+ pages of legislative history on the ADA does Congress suggest that Title III applies to foreign-flagged cruise ships." Resp. C.A. Br. 7 (citations omitted). The Fifth Circuit interpreted this "gaping hole" (*ibid.*) in the statute and legislative history the way this Court many times has instructed: "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." Pet. App. 8a.

Indeed, Congress was not merely silent in the ADA on whether the statute applies extraterritorially. Beyond the *ARAMCO* presumption, powerful enough in itself, there are powerful hints in the text of the statute that the ADA was intended to apply only *domestically*. The congressional findings and statement of purpose—which this Court found "critically" relevant when interpreting the ADA in *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 484 (1999)—observe that "some 43,000,000 *Americans* have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (emphasis added). "*[C]ensus* data, *national* polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society * * *." *Id.* § 12101(a)(6) (emphasis added). "[T]he *Nation's* proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals * * *." *Id.* § 12101(a)(8) (emphasis added). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice * * * costs the *United States* billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(9) (emphasis added). And "[i]t is the purpose of this chapter * * * to provide

a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities * * *." *Id.* § 12101(b)(1) (emphasis added). Congress expressed its concern with disability discrimination as a *national* problem, which could be rectified by enacting legislation containing a *national* solution. Whether or not a *world-wide* problem of disability discrimination exists, no ambitious intention to take such a problem on can be found in the statute.

2. The Eleventh Circuit's contrary conclusion in *Stevens*, by contrast to the court of appeals below, finds no support either in the text of the ADA or in accepted canons of interpretation. In a per curiam opinion (reversing a district court holding that relied on *ARAMCO* to hold that Title III did not apply to foreign cruise ships) the Eleventh Circuit held that the ADA's "broad reach" meant that the statute must apply to cruise ships, including those bearing a foreign flag. 215 F.3d at 1241. The court also refused to apply the *ARAMCO* presumption, apparently believing that, so long as a foreign ship was in U.S. territorial waters, regulating it was not regulating "extraterritorially"—although the court did not address the ramifications of its rule in light of the inherent mobility of cruise ships.

Petitioners too have seized on the supposed "broad reach" of Title III to support their interpretation. Pet. Br. 32. But it is ineffectual to rely on Congress's desire to "invoke the sweep of congressional authority * * *, including the power * * * to regulate commerce," and Title III's express application to "commerce," including "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same state but through another State or foreign country." Pet. Br. 32 (quoting 42 U.S.C. §§ 12101(b)(4), 12181(1)(B), (C)). This Court expressly has refused to read such "boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas" to give rise to extraterritorial application of a law. *ARAMCO*, 499 U.S. at 251 (citing, among other Acts, the

ADA).[4] "The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous * * *." *Id.* at 250. Just as in *ARAMCO*, any "broad reach" of the ADA cannot bear the weight petitioners and the *Stevens* court have placed on it. See 215 F.3d at 1241.[5]

Petitioners also argue that "neither respondent nor the court of appeals has been able to produce any evidence that Congress intended to restrict the ADA's presumptive scope." Pet. Br. 31. Petitioners' argument demonstrates the false premise underlying their entire brief. "[I]t is they"—*petitioners*—"who must make the affirmative showing." *ARAMCO*, 499 U.S. at 250. Moreover,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the

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[4] The definition of "commerce" in Title VII of the Civil Rights Act of 1964 does not explicitly mention "transportation * * * between any foreign country * * * and any State" (42 U.S.C. § 12181(1)(B), (C)), as does the definition in the ADA. See 42 U.S.C. § 2000e(g). This Court nonetheless considered interpretations of the jurisdictional reach of the ADA to be informative on the question whether Title VII applied extraterritorially. *ARAMCO*, 499 U.S. at 251. Moreover, other statutes, which do expressly refer to commerce with "any foreign country," have been interpreted, like Title VII in *ARAMCO*, not to apply extraterritorially. See, *e.g.*, *New York Central R.R.* v. *Chisolm*, 268 U.S. 29, 31 (1925) (interpreting the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, not to apply extraterritorially although the statute applied to "interstate or foreign commerce" or "commerce between any of the States * * * and any foreign nation"); *Asplundh Tree Expert Co.* v. *NLRB*, 365 F.3d 168, 174 (3d Cir. 2004) (interpreting the NLRA not to apply extraterritorially despite a definition of "commerce" that included "transportation * * * between any foreign country and any State").

[5] Likewise, the antitrust laws expressly reach all conduct "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. But courts "should not impute to Congress an intent to punish all whom its courts can catch." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.).

> achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). In *Rodriguez*, this Court explicitly disapproved just the analysis petitioners urge here—"rel[ying] on [an] understanding of the broad purposes" of a statute to the exclusion of a principled exercise in construction. *Id.* at 525.

Congress has proven itself able to legislate extraterrorially when it wants to, as is evidenced by Congress's changing Title VII of the Civil Rights Act to apply to U.S. citizens employed overseas in light of *ARAMCO*. See Pub. L. No. 102-166, 105 Stat. 1071, § 109(a) (1991) (defining "employee" to include "an individual who is a citizen of the United States" employed "in a foreign country").[6] In light of the settled understanding of the presumption against extraterritoriality, it would do violence to congressional intent to effect an about-face now and apply the ADA to foreign ships that happen to dock in U.S. ports or sail through U.S. territorial waters—as petitioner urges the Court to do. See Pet. Br. 26.

3. Another "wholly independent" (*ARAMCO*, 499 U.S. at 264) doctrine that is well developed in this Court's case law is

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[6] As this Court recognized in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), Congress understands well the presumption against extraterritoriality. When considering other legislation (relevant only contextually here), Congress specifically referenced the presumption. See, *e.g.*, H.R. REP. NO. 104-788, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 4021, 4033 ("To rebut the general presumption against the extraterritoriality of U.S. criminal laws, this subsection makes it clear that the Act is meant to apply to the specified conduct occurring beyond U.S. borders."); H.R. REP. NO. 103-65, at 58 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2488 ("The Court also noted that the presumption can be overcome by a clear expression of congressional intent to apply a particular statute outside the United States.") (citing *ARAMCO*, 111 S. Ct. at 1234).

operative here. In *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), Chief Justice Marshall wrote for the Court: "'[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains * * *.'" This doctrine also counsels that the ADA should not be construed to regulate the internal management and operations of a foreign ship when there is "[an]other possible construction"—that the Act applies only domestically.

Originating as it did in a shipping case, this venerable canon of construction is unsurprisingly applied with regularity to cases involving foreign ships temporarily present in U.S. waters. "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953). Customary international law, as memorialized in the RESTATEMENT (3D) OF FOREIGN RELATIONS § 502, provides the regulatory privileges and responsibilities of sovereign states with regard to vessels flying their flags:

> (1) The flag state is required
>
> (a) to exercise effective authority and control over the ship in administrative, technical, and labor matters; and
>
> (b)(i) to take such measures as are necessary to ensure safety at sea, avoid collisions, and prevent, reduce, and control pollution of the marine environment, and
>
> (ii) to adopt laws and regulations and take such other steps as are needed to conform these measures to generally adopted international standards, regulations, procedures, and practices, and to secure their implementation and observance.

> (2) The flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship.

Applying U.S. law to foreign ships violates this customary apportionment of regulatory authority; therefore, if any way exists for this Court to construe the ADA otherwise, it should. See *Murray* v. *Schooner Charming Betsy*, 2 Cranch at 118; *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (holding that the law of the flag state controls).

4. "The principle of deference to the law of the flag had its origins in the fiction that the vessel was an extension of the sovereign territory of the country whose ensign it flew." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 313 n.1 (1970) (Harlan, J., dissenting). The United States completely ignores this principle in arguing that petitioners' proposed rule would not apply extraterritorially. See U.S. Br. 19-21.

Petitioners and their *amici* also gloss over an important reality in this case: although they purport to seek only regulation in U.S. territorial waters, the structural changes that would be required for respondent's ships to comply with Title III are *permanent* in nature. Even if applying the ADA during a ship's temporary visit to U.S. waters is *not* applying the law extraterritorially, the law will become extraterritorial as soon as the ship leaves U.S. waters. Contrary to the views of the Government (U.S. Br. 22-23), the modifications petitioners seek to respondent's ships are utterly unlike the prohibition on carrying liquor at issue in *Cunard*, 262 U.S. 100, which in no way prevented ships from carrying liquor when *outside* U.S. territorial waters.[7]

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[7] In fact, owners of passenger ships reportedly received an economic boost during the prohibition era because of the ability of their ships to serve alcohol once outside U.S. territorial waters. Cf. Allan E. Jordan, *Echoes of Yesteryear: Fond Remembrances of Some Forgotten Element of Cruising – Cruising's Classic Past*, Jan.-Feb. 2004 CRUISE TRAVEL, available at http://www.findarticles.com/p/articles/mi_m0FCP/is_4_25/ai_112354814 (noting prohibition-era voyages into international waters to permit passengers legally to imbibe alcohol, known as "booze cruises").

And, as respondent has argued throughout this litigation, purporting to limit the application of the ADA to ships while they are in U.S. territorial waters cannot possibly be the solution. "NCL's purported obligation to make modifications would exist for the duration of the cruise. (For example, the Plaintiffs surely would not be satisfied if ramps were placed before doorways for the few minutes that the ship was in United States territory, but then removed once the ship entered international waters)." Resp. C.A. Br. 21. Petitioners have complained about

> NCL's deliberate refusal to provide accessible passage for its mobility-impaired customers to or from its ports of call (although such transportation is provided to non-disabled passengers and, in fact, is included in the cruise fare), thus excluding mobility-impaired passengers from participating in "shore excursions" at the various ports of call and leaving these passengers stranded on the ship.

Pet. C.A. Br. 7. Petitioners, thus, apparently seek ADA regulation of transfer operations in foreign ports, which of course take place *entirely* outside of U.S. territorial waters.

Because, as this case exemplifies, operations in U.S. territorial waters represent only a portion—likely even a small one—of the overall operations of a foreign ship engaged in multinational commerce, it is appropriate to treat legislation that regulates *generally* the goings-on on foreign ships as extraterritorial, and not to try to rescue some application for the legislation by construing it to apply only during the times when the ships are in U.S. territorial waters. See *Hellenic Lines*, 398 U.S. at 313 n.1 (Harlan, J., dissenting). Petitioners' and their *amici*'s arguments that their proposed rule applies only to ships operating in U.S. territorial waters (Pet. Br. 25-26; U.S. Br. 20-21) do not prevent extraterritorial application.

5. The danger of interpreting the ADA to apply to a Bahamian-flagged ship is several-fold. The "fiction" that a vessel is an extension of the sovereign whose flag it bears is not a simple legal convenience. The rule arguably is essential for multinational commerce via sea to exist at all. Respect for the regulatory authority of a foreign sovereign serves to protect "principles of comity embodied in international and maritime law that are designed to 'foster amicable and workable commercial relations.'" *Hellenic Lines*, 398 U.S. at 318 (Harlan, J., dissenting) (quoting *Lauritzen*, 345 U.S. at 582). As the Court noted in *Lauritzen*:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The problem presented by petitioners' proposed rule of applying the ADA to Bahamian-flagged ships in U.S. territorial waters is that *every* sovereign port nation may have its own regulations that could just as well be applied to ships of respondent's line as they pass through those nations' waters, or dock at their ports.

Another concern, in addition to that of overregulation, exists. This Court also has noted:

> [W]e cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen, 345 U.S. at 582. Recognizing instead, as the Restatement does (Section 502), that the nation of the flag has the privilege and responsibility to regulate the ship, can avoid such

overwhelming regulatory burdens, which pose serious threats to hamper seaborne commerce.

In addition to the concerns that this Court recognized in *Lauritzen*, regulation by this Nation of Bahamian-flagged vessels, without a clear mandate from Congress, threatens to interfere with the sovereign authority and responsibility of the Bahamas to regulate "administrative, technical, and labor matters"; to prescribe rules to "ensure safety at sea"; and to prescribe rules to ensure compliance with "international standards, regulations, procedures, and practices." REST. (3D) FOREIGN RELATIONS § 502.

Petitioners argue that the ADA does not actually conflict with the International Convention for the Safety of Life at Sea (SOLAS) (Pet. Br. 40), and presumably would make the same argument with regard to Bahamian law.[8] That argument—a first-principles attack on the rationales underlying the presumption against extraterritoriality and the *Schooner Charming Betsy* presumption—is beside the point. The *potential* for such conflicts requires interpreting legislation to apply domestically; for this reason, customary international law limits regulatory authority to the flag nation.[9] As petitioners themselves acknow-

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[8] Petitioners also rely on the statutory exception for modifications that are not "readily achievable" (Section 12182(b)(2)(A)(iv)), arguing that a change might be considered not readily achievable if it would create a conflict with SOLAS or another treaty. Pet. Br. 42. "Readily achievable" was defined by Congress to preclude the necessity of unduly expensive or difficult modifications (Section 12181(9))—*not* to protect against conflicts with foreign law. Petitioners' suggested reading of the statute tortures its language in a manner that would make it implausible at best even in the absence of the required canons of construction. Considering the *ARAMCO* and *Schooner Charming Betsy* presumptions, interpreting Title III to require a foreign vessel to justify its interpretation of Bahamian law or international treaty to avoid ADA liability is utterly insupportable.

[9] Logically, this must be so. If the question involved application of the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, which declares "Trea-

ledge, "[f]lagging states"—in this case, the Bahamas—"are responsible for ensuring that ships registered under their flags have met all SOLAS requirements." Pet. Br. 43 (citing SOLAS, CONSOLIDATED EDITION 2001, at 17-36 (Int'l Mar. Org. ed., 2001)).[10] Thus, the presumption protects against conflicts that might, or might not, arise, as well as conflicts that actually exist.

The presumption also prevents courts from applying congressional enactments where the foreign sovereign with regulatory privilege and responsibility may simply have decided, as a matter of its own social and political policy, that there should be no regulation. For this reason, it is not an answer to say that such overregulation is not a problem *in fact* because (by comparison to the United States) the Bahamas does not impose burdensome regulations on ships flying its flag. Whether the Bahamas does, or does not, decide to impose certain regulations is a matter of its own policy, which may change in the future. If petitioners' proposed rule were the law, the nation with regulatory authority—in this case, the Bahamas—would be required to take care when legislating to ensure

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ties" as well as the Constitution to be "the supreme Law of the Land," then the Court would examine the ADA for conflict with SOLAS *as it currently exists* and would invalidate any conflicting provisions. The very distinct issue of *statutory interpretation* before the Court, however, asks whether Congress *intended* to *run the risk* of a clash with SOLAS, as it existed at the time or might exist at any *future* time. Analysis of that question is not materially advanced by isolating the present provisions of SOLAS that might raise issues.

[10] Although, as petitioners note (Pet. Br. 43), port states may inspect foreign ships for SOLAS compliance, that power is limited to times when "there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention." U.S. Env'tl Protection Agency, *Cruise Ship White Paper* 10 (Aug. 22, 2000) (*White Paper*), available at http://www.epa.gov/owow/oceans/cruise_ships/white_paper.pdf. The U.S. Coast Guard monitors compliance with safety procedures by flag state, and has found no reason to suspect that Bahamian-flagged ships are not compliant. See pp. 27-28, *infra*.

that its laws did not conflict with those of the United States, simply because the United States happened to legislate first.

Petitioners argue that respondent and the court of appeals have not "articulate[d] a genuine *reason* that Congress would have intended to exempt respondent from the disabilities laws." Pet. Br. 31. Apart from the dispositive fact that respondent does not have that burden (*ARAMCO*, 499 U.S. at 250), myriad good reasons exist. This Nation's responsibilities under treaties to which it is signatory provide justification in themselves. The Convention on the International Maritime Organization (IMO Conv.), to which both the United States and the Bahamas are signatory, has as its purpose "provid[ing] machinery for cooperation among Governments in the field of governmental regulation * * * affecting shipping in international trade." IMO Conv. Art. 1(a). Such cooperation hardly is facilitated by the imposition on Bahamian-flagged ships of U.S. substantive laws and litigation procedures that the Bahamas has chosen not to adopt.

6. This is not to say that Congress cannot, if it so chooses, exercise its power to regulate conditions on board foreign ships. *Amicus* recognizes that there are circumstances in which Congress has exercised its power to do so, when Congress has made an explicit policy decision that the international comity concerns and the possibility of interruption of commerce may be appropriately sacrificed to what Congress perceived to be a more important goal. See *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting) (Congress "clearly has constitutional authority" to regulate extraterritorially and to regulate in violation of customary international law).

A recent example, of course, is the amendments to Title VII of the Civil Rights Act, enacted in 1991 in response to this Court's holding in *ARAMCO*. See p. 16, *supra*. Another circumstance, which the Fifth Circuit recognized below, is *Cunard*. With a specific exemption for the transportation of liquor through the Panama Canal, the National Prohibition Act applied to all ships within the territorial waters of the United States. Pet. App. 10a.

Cunard was an easy case. By explicitly exempting the Panama Canal from its geographic reach, the National Prohibition Act clearly applied to the limits of the U.S. territorial waters. *Cunard*, 262 U.S. at 127-128. Regulations interpreting the statute also expressly stated: "'All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port * * *.'" *Id.* at 119 (quoting the regulations).

Moreover, in that case the Court specifically interpreted the Act *not to regulate* the transport of liquor on the high seas, although it recognized Congress's power to do so as regards domestic ships (*Cunard*, 262 U.S. at 129 (noting that a nation has regulatory authority over its own ships when they are outside its territorial waters))—reaffirming the customary balance of regulatory authority since noted in the Restatement (see p. 17, *supra*). No basis exists for reading *Cunard* as petitioners and their *amici* urge, as support for interpreting statutes to require *permanent* changes to ships—which will remain after the ships have left U.S. waters—based on those ships' temporary presence in U.S. waters.

These cases demonstrate only that the Court sometimes has sufficient reason to interpret Congress's words as clearly overcoming the presumptions favoring domestic application of a statute. They do not, as petitioners and their *amici* seem to think, weaken the presumption against extraterritoriality or render it inapplicable to cases involving ships that travel to and from the United States. Rather, they show that the presumption can be rebutted if the evidence is strong enough—which it is not here. Nothing about the ADA in general, Title III specifically, or the statute's legislative history provides *any* reason to apply it extraterritorially to foreign cruise ships.

II. Business Decisions to Fly Foreign "Flags of Convenience" Are Appropriate Decisions that Responsible Companies Make All the Time

1. Respondent has made a business decision to register its ships in the Bahamas, based on an analysis qualitatively no different from that undertaken by businesses, including all members of *amicus*, for myriad business decisions made each year. It is clear that a large number of companies engaged in shipping in the United States have reached the same conclusion, as recent information from the U.S. Coast Guard indicates that 95% of passenger ships and 75% of freighters entering U.S. ports are foreign flagged. See http://www.uscg.mil/hq/g-m/pscweb/psc_speech.pdf (speech regarding the Coast Guard's Port State Control Initiative).[11]

This Court has recognized that comparable business decisions are not subject to challenge simply because they may offer legal or other advantages to the businesses that make them. In *Cannon Mfg. Co.*, 267 U.S. at 336, a business decision to maintain the corporate separateness of a subsidiary corporation in one State, so as to enjoy the privilege of doing business in

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[11] Petitioners draw from this fact a conclusion that is entirely unwarranted—that because only one U.S. cruise ship bears the U.S. flag, for Title III to have any application at all, it must apply to foreign-flagged cruise ships. Pet. Br. 32. Initially, petitioners' argument assumes that they are correct that Title III applies to cruise ships at all. *Amicus* Chamber does not address this issue, but concurs in respondent's arguments that Title III's application to cruise ships is far from clear. Moreover, although only one large oceangoing cruise ship is U.S. flagged, that statistic is misleading. There are more than a thousand passenger vessels bearing the U.S. flag—including harbor tour boats, dinner cruise boats, gambling boats, passenger ferries, river cruise boats, and smaller cruise boats operating in U.S. waters (such as to Alaska). See U.S. Maritime Admin., Office of Statistical and Economic Analysis, *U.S.-Flag Fleet of Passenger Vessels, Tugs/Towboats, and Other Work Boats as of June 30, 2002*, available at http://www.marad.dot.gov/marad_statistics/inven-part-ii-a.htm (counting 1331 U.S.-flagged passenger vessels).

that State without subjecting itself to personal jurisdiction there, was effective. The Court pointedly did not inquire into the parent corporation's reasons for the decision, which were assumed "satisfactory to itself." *Ibid.* And, in another context, this Court more recently has observed that longstanding "respect for corporate distinctions" should not be disturbed without a statement by Congress that it intended to do so. Congress is unlikely to be "reticen[t]" if it is contemplating "an important and controversial change in existing law." *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998).

Good economic incentives exist for a company—especially one like respondent owning ships that regularly dock at ports in the Bahamas—to choose to fly the Bahamian flag. "Foreign-owned ships registered in The Bahamas are exempt from customs duties and documentary stamp taxes if they exceed 150 [gross registered tons]." OFFICIAL GUIDE TO SHIP REGISTRIES 23 (Michael E. Hanson & Vernon C. Miller, Jr. eds., 2000). The Bahamas has entered into a double-taxation agreement with the United States, such that a Bahamian-flagged ship is exempt from U.S. taxes (and U.S.-flagged ships are reciprocally exempt in the Bahamas). *Ibid.*; see also *id.* at 409. Another advantage of flagging in the Bahamas is "no restrictions on the nationality of officers or seamen" (*id.* at 25), while the United States requires "[a]t least 75% of the officers and crew aboard US flag vessels [to] be US citizens" (*id.* at 411). In light of those regulatory advantages, respondent's choice to fly the Bahamian flag was a rational, legitimate business decision.[12]

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[12] Although respondent's business decisions may allow it to "escape" U.S. regulation, including laws like the ADA that do not have parallels in the Bahamas, market-based incentives operate to encourage companies, particularly cruise lines, to adopt business postures friendly to potential customers who are disabled. Petitioner's *amici* Paralyzed Veterans of America (PVA) et al. pointed out that "many cruise lines actively target persons with disabilities in their marketing materials and promotional activities * * *. Several cruise lines have already voluntarily implemented many of [DOT's] recommendations" for "accessibility

Moreover, any argument that the Bahamas has no legitimate claim to regulating respondent's cruise ships is nonsensical. Nassau, Bahamas is a major port of call for Caribbean cruises; between the 15th and the 28th of January, 2005, some 20 cruises were scheduled to call at Nassau. See http://www.cruiseline.co.uk/destinations.php?portId=106. "Nassau * * * is one of the busiest cruise-ship ports in the world." See The Cruise Company, *Bahamas Ports of Call* 10 (2001), available at http://www.thecruisecompany.com/wreports/bahamas.pdf. And, although petitioners are U.S. citizens, given the ease of foreign travel in the modern day, myriad overseas destinations cater largely to tourists from the United States, and millions of U.S. citizens find themselves subjected to regulation by foreign sovereigns every year. That fact provides no basis to subject those foreign destinations to U.S. regulation.

2. Decisions made by respondent and by other businesses to fly the flag of a foreign sovereign and to list their ships on foreign registries also are the kinds of business decisions that long have been recognized by the U.S. Government as valid. In the Merchant Marine Act of 1936, as amended, Congress gave the Secretary of Transportation the power to "provide insurance and reinsurance against loss or damage by war risks." 46 U.S.C. app. § 1282(a). Insurable vessels include certain "foreign-flag vessels owned by citizens of the United States or engaged in transportation in the water-borne commerce of the United States." *Id.* § 1283(a).

Regulations promulgated by DOT pursuant to authority of the Act (see 46 U.S.C. app. § 1114(b)) recognize that only ships registered on the Bahamian registry, along with four other

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standards." PVA Br. 6. If, as *amici* would have the Court believe, respondent is somehow the only cruise line not accessible to passengers with disabilities, it is certain to suffer from its inability to market its product to a large customer base. (In fact, respondent vehemently denies that its ships are less accessible than those of other lines; we understand that this point will be addressed in respondent's brief.)

registries, are eligible for war-risk insurance. 46 C.F.R. § 308.2(a). The Act, and regulations it authorized, reflect an express recognition by Congress and the DOT of the value of foreign registries such as that of the Bahamas.

Further evidence exists of the federal government's recognition of the validity of and respect for the Bahamian registry. The U.S. Coast Guard has implemented a "Port State Control Initiative" whereby it establishes indices to determine what "risk"—categorized by "safety" and "security"—is presented by a ship seeking entry to U.S. ports. The program uses a point system, with points serving as "black marks," assigned to the "three entities [that] directly influence a vessel's operational condition and compliance with international safety and environmental protection standards. These entities are: 1) Ship Management List, 2) Classification societies, and 3) Flag States." http://www.uscg.mil/hq/g-m/pscweb/Boarding%20Matrix.htm. The more "points" assigned to a vessel under any of the appropriate indicia, the more likely that vessel is to be boarded by the Coast Guard because of concerns about safety issues. A similar analysis is undertaken with regard to possible security concerns.

Notably, the Bahamian registry is not listed in either matrix—meaning no points due to safety or security concerns are assessed to Bahamian-flagged vessels. See http://www.uscg.mil/hq/g-m/pscweb/FlagSafety.htm (list of Flag States "identified as having a detention ratio higher than the overall average"); http://www.uscg.mil/hq/g-m/pscweb/FlagSecurity.htm (list of Flag States presenting security concerns). The careful attention that the Coast Guard pays to safety and security issues under the Port State Control Initiative and the conclusions that Bahamian-flagged vessels present no special concerns demonstrate that—contrary to arguments advanced by petitioners and their *amici* (Pet. Br. 31-33; Gutoff Br. 3-16)—the Bahamian registry is not considered by the federal government to be in any manner a toothless watchdog.

3. The Coast Guard's and DOT's perceptions that registration in the Bahamas reliably ensures compliance with safety and security standards are accurate. Like the United States, the Bahamas is a member of the International Maritime Organization (IMO), and has been for nearly 30 years. See http://www.imo.org/home.asp (link to list of IMO member states). Recognizing that "[s]hipping is perhaps the most international of all the world's great industries and one of the most dangerous," the IMO exists to "'encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'" *Ibid.* ("Introduction to IMO") (quoting IMO Conv. Art. 1(a)).

> The IMO is an established United Nations governing body that sets standards and adopts regulations that apply to all vessels that operate international voyages. The IMO is based in London and includes representatives from 152 major maritime nations including the United States. Since its inception in 1948, the IMO's most important objectives have been to improve vessel safety and to prevent marine pollution.

White Paper, *supra*, at 9.

Member states of IMO are required to agree to rigorous requirements set forth in conventions, including SOLAS, the International Convention for the Prevention of Pollution from Ships, and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers. In its "Status of Conventions" worksheet, the IMO lists the Bahamas as participating in those three, as well as in numerous others. In fact, the Bahamas is signatory to 30 conventions, protocols, or subparts of conventions or protocols, as compared to the United States' participation in 28. See http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10793/status.xls.

No basis exists to treat respondent's, or any other business's, decision to register its ships in a foreign sovereign

as in any way less worthy of respect than a decision such as where to incorporate or where to locate a principal place of business, which also are made based on the various costs and benefits of different choices. The result of the court of appeals' decision in this case is that respondent's vessels are subjected to the regulation of the Bahamas, unless, with regard to a particular piece of legislation, Congress has made a clear expression of intent to regulate the internal management and affairs of those ships. Because Congress did not do so in the ADA, Title III does not regulate respondent's Bahamian-flagged ships, and no reason exists to disturb the Fifth Circuit's holding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 03-1388

IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE COMMONWEALTH OF THE BAHAMAS AND THE BAHAMAS MARITIME AUTHORITY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

The overriding question in this case is whether Congress, in enacting Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, intended to engraft onto the robust body of international law governing foreign-flagged vessels an indeterminate code of American structural and design requirements that would attach to a foreign vessel as soon as she entered a United States port.[1] The Commonwealth of the Bahamas and the Bahamas Maritime Authority (collectively, The Bahamas) have a direct and substantial interest in the resolution of that question.

The Commonwealth of the Bahamas (Commonwealth) became an independent nation on July 10, 1973, following 325 years of British rule. The Commonwealth established a democratic state with a tripartite form of constitutional government in which the Queen of England is the titular Head of State. The Commonwealth is an active participant in the world community and a fully self-governing member of the United Nations, Commonwealth of Nations, Organization of American States, and Caribbean Community. The Bahamas Maritime Authority (BMA) is an arm of The Bahamas Ministry of Transport and Aviation. The BMA oversees the Bahamas Merchant Shipping Register, administers the laws governing vessels on that register, represents the Commonwealth in international organizations concerning maritime matters, and advises the Commonwealth on maritime matters. The BMA has offices in Nassau, London, and New York, and agents in Tokyo.

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[1] Pursuant to S. Ct. Rule 37.6, The Commonwealth of The Bahamas and The Bahamas Maritime Authority state that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties.

First discovered by Christopher Columbus in 1492, The Bahamas comprise an archipelago of some 700 islands located along prime shipping lanes in the Atlantic Ocean. The Bahamas has a rich maritime heritage and today has the world's third largest ship registry. More than 1300 vessels—over 100 of which are cruise ships—fly the Bahamian flag, including cruise ships operated by the respondent in this case. BMA, Ship Registration Services 6-7 (2003). The Bahamas has more cruise ships on its registry than any other nation, but cruise ships comprise less than 10 percent of the vessels on The Bahamas' registry. *Id.* at 7. The Bahamas' registry comprises a full range of craft, including container ships, bulk carriers, reefers, and offshore oil and gas vessels. *Id.* The Bahamas is an active hub of international maritime trade and an important maritime gateway to the Americas.

The Bahamas has a well-established sovereign interest in each of the ships that fly its flag, which, at least figuratively speaking, are a part of her territory. "[T]he well-established rule of international law [is] that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That rule is based on the centuries-old understanding "that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of each state that owns her." *Lauritzen* v. *Larsen*, 345 U.S. 571, 585 (1953). Among other things, the flag state is responsible for determining how its vessels must be designed, built, and modified. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 cmt. b (1986). The Bahamas, like other maritime nations, carefully exercises that important sovereign authority.

The Bahamas has ratified every major convention on maritime safety, including the seminal Convention for the

Safety of Life at Sea (SOLAS), Nov 1. 1974, 32 U.S.T. 47.[2] The Bahamas is a member of the governing council of the International Maritime Organization (IMO), a specialized agency of the United Nations which is represented by 164 Member States and is responsible for developing international rules governing the safety and security of vessels. When a nation joins the IMO, it agrees to make its conventions part of its own law. The Bahamas has played a leading role on the governing council of the IMO in developing protocols and amendments designed to promote safety and uniformity in international maritime commerce. This overarching concern for maritime safety, coupled with a rigorous annual-inspection program to ensure that vessels on its register comply with Bahamas and international safety standards, has ensured that Bahamian-flagged ships are among the safest in the world. *See* Part B, *infra*.

The Bahamas—whose people are constitutionally committed to preventing discrimination, *see* Bahamas Const. art. III—ascribes to the aspirations of the ADA and supports the efforts of all vessel owners to prevent discrimination against individuals with disabilities. As a nation whose history and fortunes are inextricably intertwined with maritime commerce, however, The Bahamas is also deeply committed to the international fabric and law of nations governing shipping, including the rule that the "law of the flag" governs the internal affairs of the ship. To the extent that regulatory action is necessary to prevent discrimination

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[2] *See, e.g.*, Convention on Load Lines, 18 U.S.T. 1857 (1966); Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, July 7, 1978, 1361 U.N.T.S. 190; Convention on Facilitation on International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411; International Labor Organization, Convention Concerning Minimum Standards in Merchant Ships, No. 147, 15 I.L.M. 1288 (1976).

on vessels in United States ports or other ports around the world, an existing international framework—including the IMO—exists to act in a multilateral fashion that would avoid the undesirable prospect of one nation seeking to impose its own structural requirements on the ships of other nations and, even worse, the prospect of many nations imposing different or conflicting requirements in a fashion that could wreak international havoc for maritime nations.

SUMMARY OF ARGUMENT

International law was largely borne of the need for civilized societies to establish a uniform set of rules for shipping. For centuries, the law of nations has recognized that the law of the flag state generally governs the internal affairs of a ship, including the structure and design of the ship. That rule is based on the common-sense understanding that there must be some law that governs the internal affairs of the ship, and that maritime commerce would be stifled if the internal affairs of a ship were governed by a different set of laws every time it called on a new foreign port. This Court has long recognized the "cardinal importance" of the international "law of the flag," *Lauritzen* v. *Larsen*, 345 U.S. 571, 584-585 (1953), as well as the fundamental sovereign interest of foreign nations to regulate the internal affairs of vessels that fly their flag.

The Court will not construe an Act of Congress to apply to the "internal affairs" of foreign-flagged vessels that enter United States waters absent "'the affirmative intention of Congress clearly expressed.'" *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). Congress has not clearly expressed any "affirmative intention" to subject foreign-flagged vessels that enter United States waters or its ports to a specialized code of American structural and design requirements. Nothing in the text of Title III of the ADA expressly calls for such regulation. Nor is there any indication in the voluminous legislative history of the ADA

that Congress weighed the likely international ramifications of subjecting foreign-flagged ships to such a regime. In order to avoid an unintended collision between United States law and the law of nations, this Court accordingly should hold that Title III does not apply to foreign-flagged vessels.

A contrary ruling would invite the international discord that the Court's clear-statement rule is designed to avoid. Applying Title III's general accessibility provisions to foreign-flagged ships would intrude on the sovereign authority that flag states, including The Bahamas, have traditionally exercised over the internal affairs of vessels on their registries, including with respect to matters of structure and design. It would also interfere with the active international body of law, including SOLAS, governing matters relating to ship design and structure. Not only would such a result draw the United States into potentially embarrassing international clashes, but it could precipitate enormous uncertainty and confusion on a global level. If the United States chose to apply its own accessibility standards to foreign-flagged ships entering its waters, many of the other 40 countries around the world with antidiscrimination laws might respond by attempting to apply their own unique—and divergent, if not contradictory—set of standards to foreign-flagged ships, including U.S. ships. International maritime commerce would run aground, as no vessel could possibly navigate such an unpredictable and stormy regulatory sea.

There is no reason for this Court to disregard the prospect for such international discord on the basis of petitioner's attack on the legitimacy of the Bahamanian flag. The United States has recognized that ships flying the Bahamanian flag are subject to the sovereign control of The Bahamas, and that the regularity of a registration may be questioned only by the flag state. Moreover, The Bahamas has developed a comprehensive regulatory scheme governing the vessels that it registers, which is interwoven with all the major international conventions governing maritime matters. The

Bahamas subjects its vessels to rigorous inspections and Bahamanian-flagged ships are recognized as among the safest in the world. In deciding this case, this Court accordingly should give full sovereign weight to the Bahamanian flag, not to mention the flags of other major maritime nations, which have the same interest in ensuring that the community of nations respects the law of the flag.

ARGUMENT

TITLE III OF THE ADA DOES NOT APPLY TO FOREIGN-FLAGGED VESSELS

Over centuries, the law of nations has come to recognize that seafaring vessels need to be governed by one set of laws, and that those laws typically are supplied by the flag state. The Bahamas carefully exercises that sovereign authority with respect to the vessels that fly its flag on waters the world over. The Bahamas recognizes that the United States Government, like the governments of all seafaring nations, has the sovereign authority to apply its own laws to the foreign-flagged ships that enter its territorial waters or ports. *See Patterson* v. *Bark Eudora*, 190 U.S. 169, 173 (1903); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812). The question before the Court is whether the United States Congress actually chose to exercise that authority when it enacted Title III of the ADA. The resolution of that question is of far-reaching concern to the maritime nations of the world including The Bahamas.

Petitioners and the United States argue that Congress intended Title III to apply to foreign flag vessels because "[n]othing in the statute *exempts* foreign-flagged ships * * * from Title III's non-discrimination and accessibility requirements." U.S. Br. 15 (emphasis added); Pet. Br. 31. That argument turns the settled rule of construction on its head. Under this Court's precedents and general principles of maritime law, it is presumed that "the law of the flag state ordinarily governs the internal affairs of a ship," *McCulloch*, 372 U.S. at 21, even when that ship calls on foreign ports.

That heavy presumption will prevail unless Congress has "clearly expressed" an "affirmative intention" to apply domestic law to foreign-flagged vessels. *Benz*, 353 U.S. at 147; *see McCulloch*, 372 U.S. at 21-22.

Title III lacks such a clear statement. Nowhere does the Act refer to foreign-flagged ships. Nor is there any mention in the text of the ADA—or even in the more than 3000 pages of accompanying legislative history—that Congress weighed the "possibilit[y] of international discord" (*Benz*, 353 U.S. at 147), or risk of "retaliative action" (*id.*), that would ensue if Congress applied Title III to foreign-flagged ships. Nor did Congress receive testimony from officials of the Department of State, or invite the testimony of representatives of foreign governments, as to the ramifications of applying Title III to foreign-flagged ships, as Congress often does when it legislates in the "delicate field of international relations." *McCulloch*, 372 U.S. at 21. In the absence of such a clear statement, there is no reason to construe Title III in a manner that would invite international discord and confusion.

A. The Law Of Nations Has For Centuries Recognized That The Law Of The Flag State Generally Governs The Internal Affairs Of A Vessel

In considering claims that United States law applies to foreign-flagged ships, this Court has emphasized that federal statutes will "be applied by the courts to * * * foreign ships * * * only in accordance with the usual doctrine and practices of maritime law." *Lauritzen*, 345 U.S. at 581; *see McCulloch*, 372 U.S. at 19 n.9; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 381-384 (1959); *Benz*, 353 U.S. at 142. Two customary maritime doctrines and practices are particularly relevant here. The first is that the nationality of a ship is determined by its registry and its flag. *Lauritzen*, 345 U.S. at 584; *see St. Clair* v. *United States*, 154 U.S. 134, 151-152 (1894); *Ross* v. *McIntyre*, 140 U.S. 453, 472-473 (1891); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 501. The rule of the "flag" is

significant because "[t]he ascription of nationality to ships is one of the most important means by which public order is maintained at sea." R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 257 (3d ed. 1999). The second principle, which follows from the first, is that the universal practice among maritime nations is to "give[] cardinal importance to the law of the flag." *Lauritzen*, 345 U.S. at 584. This is, in fact, "[p]erhaps the most venerable and universal rule of maritime law." *Id.*; *see McCulloch*, 372 U.S. at 21; *Romero*, 358 U.S. at 382-384; *see also* E. VATTEL, LAW OF NATIONS, Bk. 1, c. 19, § 216 (Joseph Chitty ed. 1852) (1758).

Together, these bedrock principles of international law give rise to the operative rule in this case: that "the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch*, 372 U.S. at 21. As this Court has observed:

> From experience * * * it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew toward the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and *all things done on board, which affected only the vessel* or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.

Mali v. *Keeper of Common Jail (Wildenhus's Case)*, 120 U.S. 1, 12 (1887) (emphasis added).[3]

[3] *Accord United States* v. *Rodgers*, 150 U.S. 249, 260 (1893) ("The general rule is that the country to which the vessel belongs will exercise jurisdiction over *all matters affecting the vessel*, or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority.") (emphasis added); *United States* v. *Flores*, 289 U.S. 137, 158 (1933).

This "well-established rule of international law" dates back centuries. *McCulloch*, 372 U.S. at 21. Indeed, long before this Court formally endorsed it, the rule had already "been supported by writers on international law, and ha[d] been recognized by France, Belgium, and other continental countries, as well as by England and [the executive branch of] the United States." *United States* v. *Flores*, 289 U.S. at 157 (citations omitted). In addition, as the United States has explained to this Court, the rule is "reflected not only in the settled decisions of this Court, but also in the Treaties of the United States and the regulations of the State Department." *McCulloch*, *supra*, Br. for the United States as Amicus Curiae, at 43 (*McCulloch* U.S. Br. 43) (footnote omitted).

Without a reciprocal arrangement by which all nations defer to a flag state's regulations affecting a ship's "internal affairs," the essential functions and operations aboard a vessel could abruptly change at every port of call. And that is assuming that they even could change. After all, there are a number of shipboard operations that are so fixed and integrated—ship structure and design being two—that they simply could not change from port to port. As this Court has observed in a similar vein, such an unpredictable regime would create "not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." *Romero*, 358 U.S. at 384; *see also* Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 504 (1960) ("The absolute power of the coastal state [to regulate foreign vessels] is tempered * * * by the demands of comity among nations, which require it to exercise a high degree of self-restraint, particularly in matters involving the 'internal economy' of a foreign vessel.").

B. The Bahamian Flag Is Entitled To The Full Weight Of Sovereignty Under The Time-Honored Law Of Nations Giving Cardinal Importance To The Flag

In light of the settled international rule that the "law of the flag" governs the internal affairs of the ship, all maritime nations that register vessels have a fundamental sovereign interest in the regulation of the vessels that fly their flag. The Bahamas exercises that sovereignty and responsibility with great care and, in doing so, has played a leading role in the development of international law designed to promote maritime safety and other matters. The Court should reject petitioners' unfounded suggestion that the Bahamian flag enjoys "little if any genuine sovereignty," Br. 31, and that foreign flagging is a mere "facade." Br. 2, 7.

The United States and The Bahamas have signed treaties and understandings regarding maritime commerce in which the United States has recognized that ships registered with The Bahamas and flying The Bahamian flag are subject to the sovereign control of The Bahamas. *See* Agreement Effected by Exchange of Notes, Oct. 5, 1982, 35 U.S.T. 3843. Moreover, "[t]he United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state." *Lauritzen*, 345 U.S. at 584. That position accords with the law of nations. *See*, *e.g.*, Law of the Sea Convention, art. 94(6); *cf. Muscat Dhows Case*, 2 Am. J. Int'l L. 921 (Fr. 1908) ("Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe rules covering such grants."). Accordingly, it is telling that the United States does not join petitioners' unavailing effort to demean the Bahamanian flag.

More than just U.S. diplomatic practice and policy confirm that The Bahamas is not a "flag of convenience." The United Nations Convention on the Conditions for Registration of Ships, which was drafted "to tighten the conditions under which * * * 'flags of convenience'[] would be allowed to

register ships," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 501 rep. note 7, identifies several significant steps that a responsible flag state must take. *See* U.N. Convention on the Conditions for Registration of Ships, Feb. 7, 1986, art. 5, 26 I.L.M. 1229 (1987) (Ship Registration Convention).[4] The Bahamas has taken them all. For example, the Convention provides that each ship must be "periodically surveyed by [the flag state's] authorized surveyors in order to ensure compliance with applicable international rules and standards." *Id.* art. 5(3)(b). Under Bahamian law, all Bahamian-flagged ships must undergo an annual inspection. *See* BMA, BMA Information Bulleting No. 10, *available at* <http://www.bahamas maritime.com/ index.htm>. This inspection examines more than 150 discrete aspects of ship safety and design—including the ship's machinery, safety equipment, manning arrangements, certificates, documentation, charts, and other navigational equipment. *See* Guidelines For BMA Approved Inspectors (App. 12-39). By establishing the BMA to administer these inspections, The Bahamas has thus satisfied the Convention's requirement that a "flag State shall have a competent and adequate national maritime administration" to ensure that its ships comply with all "applicable international rules and standards." Ship Registration Convention, art. 5(1), (3)(a).

By scrupulously enforcing these safety and design standards, The Bahamas not only ensures the integrity of its ships, but also effectively deters less reputable ship operators from seeking to join the registry in the first place. Indeed, The Bahamas purposefully charges an initial registration fee that "is higher than that of some other registers" precisely as a way "to discourage less reputable operators." BMA, Ship Registration Services 13 (2003). Moreover, to ensure that The Bahamas remains a premier registry, every ship operator

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[4] The Ship Registration Convention is not yet in force, but nonetheless remains an instructive statement of customary international law on registration requirements.

must produce more than two dozen different certificates, declarations, and applications designed to demonstrate the operator's reputability.[5] *See also* BMA, The Bahamas Flag State Performance Self-Assessment Form (summarizing The Bahamas' commitment to international standards and its performance record) (App. 1-11). And when there is an accident involving one of its vessels, the BMA conducts a detailed investigation. This comprehensive regulatory scheme has worked: over the past decade Bahamanian-flagged ships have ranked among the safest in the world.

More generally, petitioner's attack on the Bahamanian flag overlooks the active role that The Bahamas has played in the international framework governing shipping. As noted above, The Bahamas is a signatory to every major maritime convention. *See* note 2, *supra*. Moreover, The Bahamas occupies a seat on the IMO's governing council, which is "composed of the representatives of thirty-two States with the largest interests in the provision of shipping and international seaborne trade and other special interests in maritime transport or navigation." R.R. CHURCHILL & A.V. LOWE, *supra*, at 23. In that capacity, The Bahamas has played a leadership role in proposing and shaping new standards for shipping safety and design. *See* Part E, *infra*.

The Bahamas, in short, is a full-fledged member of the community of maritime nations. And its flag is entitled to the full weight of sovereignty and respect enjoyed by the flags of the other leading maritime nations of the world.[6]

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[5] These include SOLAS Certificates, Passenger Ships-Safety Certificates, Loan Line Certificates, Bills of Sale or Builder's Certificates, Certificates of Company Incorporation, International Tonnage Certificates, Declarations of Ownership, and Safe Manning Certificates. *See* BMA, Registration Requirements, *available at* <http://www.bahamasmaritime. com/index.htm>.

[6] The amicus law professor notes that The Bahamas relies on eight classification societies to inspect Bahamian-flagged ships. That does not undermine the sovereignty of the flag or the respect to which it is entitled. The U.S. Coast Guard relies on *five* of those eight classification societies in conducting U.S. inspections. *See* Classification Society Authorizations by the U.S. Coast Guard, *available at* <http://www.uscg.mil/hp/g-m/mse/acp/authorizations .htm>. Moreover, the eight societies that The Bahamas uses are all members of the International Association of Classification Societies—an organization that enjoys observer status at the IMO.

C. When Congress Legislates In This Delicate Field Of International Relations, It Intends For The Law Of The Flag State To Apply Unless It Clearly States Otherwise

The venerable rule that the law of the flag state governs the "internal affairs" of ships developed "from acceptance by common consent of civilized communities" over centuries. *Lauritzen*, 345 U.S. at 582; *see De Lovio* v. *Boit*, 7 F. Cas. 418 (Cir. Ct. D. Mass. 1814) (Story, J.); *The Sally*, 12 U.S. (8 Cranch) 382 (1814). Congress is presumed to be aware of that law of nations and to respect it. *See McCulloch*, 372 U.S. at 20 n.10; *see also EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991). As Chief Justice Marshall famously declared, "an act of Congress ought never to be construed to violate the law of nations, if any other construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In a series of cases, this Court has tailored the *Charming Betsy* canon to the "highly charged international" context of applying United States law to a foreign-flagged vessel and declared that it will not interpret an Act of Congress to apply to foreign-flagged vessels that enter the United States absent "'the affirmative intention of the Congress clearly expressed.'" *McCulloch*, 372 U.S. at 21-22 (quoting *Benz*, 353 U.S. at 147).[7]

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[7] Petitioners suggest that the canon of construction that gives cardinal importance to the law of the flag state should not apply if a foreign-flagged vessel has a particular a "U.S. nexus" (Br. 2, 36). That contention is without merit. In undertaking the jurisdictional determination whether foreign-flagged vessels are subject to

That rule of construction itself has deep roots in our nation's history and diplomatic practice. As early as 1842, Secretary of State Webster, in protesting the application of British colonial law to United States ships temporarily docked in the Bahamas (then under British rule), forcefully articulated the United States's view that a clear statement was necessary before one sovereign could legitimately apply its laws to foreign-flagged ships that enter its ports:

> A merchant-vessel enters the port of a friendly state * * * by the presumed allowance or permission of that sovereignty. This permission or allowance is founded on the comity of nations, * * * and this comity is part, and a most important and valuable part, of the law of nations to which all nations are presumed to assent until they make their dissent known. In the silence of any positive rule affirming, or denying, or restraining the operation of foreign

United States laws in U.S. territory, this Court's decisions have drawn a bright line based on whether a vessel is foreign-flagged. Substituting a "nexus" test for the foreign-flag test would subject this important jurisdictional determination to "a purely *ad hoc*" and factbound analysis that "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice." *McCulloch*, 372 U.S. at 19. Especially in this sensitive area of international law, the threshold determination of what law applies should be subject to a clear and predictable rule.

This Court has employed a contacts-based approach in applying the Jones Act, 46 U.S.C. § 688, to individual cases. As the United States explained in *McCulloch*, however, "the choice of law to govern a maritime tort raises altogether different questions than a claim of jurisdiction to regulate [under a statute]." *McCulloch*, U.S. Br. 53. "Although the weighing of various 'contacts' is a recognized basis for choosing the law to govern the legal incidents of a single transaction," there is no basis for applying "shifting standards" for determining what law applies to vessels as they "move[] from the territorial waters of one nation to another." *Id.*

> laws, their tacit adoption is presumed, to the usual extent.

6 Webster's Works 303, 310 (letter to Lord Ashburton, Aug. 1, 1842).

Moreover, the clear-statement rule is an essential safeguard for ensuring that Congress, and not the courts, carefully weighs the "possibility of international discord" before extending United States law in this "delicate field of international relations." *McCulloch*, 372 U.S. at 21; *see also NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain" in this sphere. *Benz*, 353 U.S. at 147. Before this Court will conclude that Congress has adopted a policy that departs from the usual comity and reciprocity exercised in this area of international law, it must be clear that Congress contemplated and affirmatively chose to place the United States on such a collision course.

D. Congress Did Not Clearly State An Intention To Displace The Law Of Nations Governing Vessels By Subjecting Foreign-Flagged Vessels To Title III Of The ADA

A proper application of the clear-statement rule in this case leads to the conclusion that Congress did not intend to apply Title III of the ADA to foreign-flagged ships. Nothing in Title III "clearly express[es]" any "affirmative intention" on the part of Congress to apply the Act's accessibility rules to such vessels. *Benz*, 353 U.S. at 147. Indeed, nothing in the Act, nor even its 3000-page legislative history, alludes to foreign-flagged ships, much less confirms that Congress weighed the potential for international strife and retaliatory action by subjecting foreign flagged ships to a specialized code of structural and design requirements. *See Benz*, 353 U.S. at 144 ("[N]o discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress

intended the coverage of the Act to extend to circumstances such as those posed here."); *McCulloch*, 372 U.S. at 20.

Petitioners and the United States ground their contrary interpretation on generalized language of the ADA. In particular, petitioners and the United States point to the Act's definition of "commerce." *See* Pet. Br. 31-33; U.S. Br. 16-17. In *McCulloch*, however, this Court rejected an almost identical argument that the broadly worded definition of "commerce"—which also referred to "foreign commerce"—in the National Labor Relations Act established an "affirmative intention" to apply the Act to foreign-flagged vessels that enter the United States. *See* 372 U.S. at 15 n.3 (quoting 29 U.S.C. § 152(6)); *id.* at 19 (noting lack of "any specific language" establishing that "Act may be read literally as including foreign-flag vessels within its coverage"); *ARAMCO*, 499 U.S. at 251-252 (discussing *McCulloch*). What is more, in *McCulloch*, the United States, as amicus curiae, specifically urged the Court to adopt that construction of the Act. *See McCulloch* U.S. Br. 30.

Citing *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923), petitioners and the United States argue that Title III must be construed to apply to foreign-flagged cruise ships in order to create "a comprehensive ban on discrimination against individuals with disabilities throughout the nation." U.S. Br. 17; Pet Br. 29-30. *Cunard* considered whether the National Prohibition Act applied to foreign-flagged vessels that enter United States ports. The Court answered that question in the affirmative, but there are at least two key distinctions between this case and *Cunard*. First, the National Prohibition Act expressly excepted shipping in the Panama Canal Zone. 262 U.S. at 128. Based on that textual exception, the Court reasoned that Congress intended the Act "to be operative throughout the territorial limits of the United States, *with the single exception stated in the Canal Zone provision*," and "to apply to all merchant vessels, whether foreign or domestic, within those waters." *Id.* at 128-129

(emphasis added). There is no comparable textual statement in Title III of the ADA. Second, contraband—like alcohol, during prohibition, or controlled substances today—presents unique enforcement concerns. Any domestic opening in the enforcement scheme may defeat an *entire* prohibition effort. Congress's admirable effort to prevent discrimination against the disabled on the land, and even on domestic ships, would not be circumvented if Title III did not apply to foreign ships. And, by not extending Title III to such ships, Congress avoided potential international discord and retaliation.

Petitioners and the United States suggest that the "dearth of U.S.-flagged cruise ships * * * means that Congress would *ipso facto* have intended [Title III] to apply to *foreign-flagged* cruise ships operating in U.S. waters." Pet. Br. 32 (emphasis in original); U.S. Br. 15-16. That surmise falls far short of the requisite clear statement. In any event, Title III has an extensive application to businesses and public places in the United States other than foreign-flagged ships. There is no reason to think that Congress believed that the objectives of the Act would be thwarted if it did not extend it to foreign-flagged vessels. Moreover, the settled rule that United States law does not displace the law of the flag does not ebb and flow based on the percentage of foreign-flagged vessels in United States waters. Nor do the international concerns about applying United States law to foreign-flagged vessels evaporate once the number of foreign vessels in United States waters reaches a certain level.

In the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, Congress *expressly* applied environmental regulations to foreign-flagged vessels, even though the vast majority of tankers operating in United States waters are foreign. *See id.* But Congress did not reach this conclusion lightly.[8] To the contrary, the Senate Report

[8] In fact, Congress delayed the effective date of the Act for more than a year so that the Secretary of Transportation could circulate the "proposed environmental protection rules and regulations with

indicated that "the inclusion of foreign-flag vessels entering the waters of the United States was a matter of some controversy during the hearings on the legislation." S. Rep. No. 92-724, at 22 (1972). Yet, unlike as to Title III of the ADA, Congress directly weighed the "justifiable concerns [that] were expressed about the unilateral application by the United States of standards on vessels of foreign registry." *Id.*

Statutes—like the Ports and Waterways Safety Act—that expressly assert jurisdiction over foreign-flagged ships "buttress[]" (*ARAMCO*, 499 U.S. at 258) the conclusion that Congress did not intend Title III to apply to foreign-flagged ships. *See also, e.g.*, 46 U.S.C. App. § 1903(c)(1)(C) (Maritime Drug Law Enforcement Act applies to "vessel[s] subject to the jurisdiction of the United States," including vessels "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States"); 15 U.S.C. § 1175(a) (making it unlawful to "manufacture, recondition, repair, sell, transport, possess, or use any gambling device * * * on a vessel * * * documented under the laws of a foreign country"); 46 U.S.C. § 10313(i) (Seaman's Wage Act applies to "a seaman on a foreign vessel when in a harbor of the United States"). These enactments demonstrate that Congress knows well how to extend United States law to foreign-flagged vessels when it wants to.

In short, petitioners and their amici have failed to show that Title III of the ADA contains the type of "affirmative intention" (*Benz*, 353 U.S. at 147) necessary to overcome the clear-statement rule in favor of applying the law of the flag.

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respect to vessel design to the appropriate international forums for consideration as international standards." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 167 (1978) (citing 46 U.S.C. § 391a(7)(B)). This underscores how seriously Congress considers legislation that threatens to disrupt the normal rules of international comity.

E. Extending Title III To Foreign-Flagged Ships Would Disrupt A Vibrant Body Of International Law And Invite International Discord And Confusion

Since at least the *Charming Betsy*, this Court has carefully piloted its jurisprudence to avoid "unintended clashes between [United States] laws and those of other nations which could result in international discord." *ARAMCO*, 499 U.S. at 248. Such caution is especially appropriate here.

1. A uniform set of rules governing the design and structure of ships is essential at the global level.[9] That is why international law designates a *single* sovereign responsible for regulating each ship's design, safety, and structure—the state whose flag the ship flies. *See* Convention on the High Seas, Apr. 29, 1958, art. 10, 13 U.S.T. 2312 (High Seas Convention); United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 94, 1833 U.N.T.S. 397 (Law of the Sea Convention); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 502. Both the High Seas Convention and the Law of the Sea Convention provide that "[e]very State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard * * * to * * * [t]he construction, equipment and seaworthiness of ships." High Seas Convention, art. 10(c); *accord* Law of the Sea Convention, art. 94(3)(a); *see also* Law of the Sea Convention, art. 94(1) ("Every State shall effectively

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[9] This Court's admiralty and preemption precedents have recognized that—as a *domestic* matter—only one sovereign can effectively prescribe design standards for maritime commerce. *See Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674-675 (1982); *Sisson* v. *Ruby*, 497 U.S. 358, 362 (1990). Thus, the Court has on several occasions found that Congress has preempted state rules governing vessel designs because of the need for a "uniform federal regime" controlling such maritime matters. *United States* v. *Locke*, 529 U.S. 89, 111 (2000) (quoting *Ray* v. *Atlantic Richfield Co.*, 435 U.S. at 165). The need for such uniformity is exponentially greater when it comes to *international* shipping.

exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.").[10]

While this rule provides predictability by ensuring that ships will only have to comply with a single set of design rules, by itself it would do nothing to promote international uniformity, since each flag state would be free to apply its own idiosyncratic standards to its own vessels. Therefore, international law also provides that, in adopting rules for vessel design and structure, "each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance." High Seas Convention, art 10(2); *accord* Law of the Sea Convention, art. 94(5). The upshot of this well-established international regime—in which virtually all maritime nations, including the United States and The Bahamas, participate—is that the flag state remains at all times the single sovereign authorized to prescribe design rules, but in doing so, must ensure that those regulations meet a number of established international standards.

Those international standards arise from "a significant and intricate complex of international treaties and maritime agreements." *Locke*, 529 U.S. at 102. The principal source for international design and safety standards today is the 1974 SOLAS Convention, 32 U.S.T. 47.[11] Ratified by 137

[10] Although it has not yet ratified the Law of the Sea Convention, "[t]he United States has long accepted [the Convention] as embodying international law." U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 675 (2001) (statement of Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council).

[11] Some of the other major conventions that help contribute to the uniformity of international maritime law are: Convention on Load Lines, 18 U.S.T. 1857 (1966); Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, July 7,

nations—whose registries comprise together more than 98 percent the world merchant shipping fleet, R.R. CHURCHILL & A.V. LOWE, *supra*, at 273—SOLAS "contains a large number of complex regulations laying down standards relating to the construction of ships, fire-safety measures, life-saving appliances," and a half dozen other subjects. *Id.* Recognizing that international law assigns flag states responsibility for prescribing safety and design regulations, the Convention obligates all signatories to enact domestic laws and regulations incorporating SOLAS's comprehensive standards. Thus, for example, The Bahamas' Merchant Shipping Act expressly provides that the SOLAS Convention "shall have the force of law." Bahamas Merchant Shipping Act, ch. 246, § 185(6); *see id.* § 185(8) ("The Minister [of Transportation] may make such regulations as he considers appropriate to give effect to SOLAS * * *.").[12]

SOLAS was originally adopted in 1914 in response to the sinking of the *Titanic*. *See* R.R. CHURCHILL & A.V. LOWE, *supra*, at 265; IMO, *Surviving Disaster—The Titanic and SOLAS* (graphic of *Titanic* disaster and provisions of SOLAS that address safety issues related to the disaster), *available at* <http://www.imo.org/Safety/mainframe.asp?topic_id=479)>. SOLAS has been repeatedly updated since its enactment. Revised SOLAS Conventions were adopted in 1929, 1948,

1978, 1361 U.N.T.S. 190; Convention on Facilitation on International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411; International Labor Organization, Convention Concerning Minimum Standards in Merchant Ships, No. 147, 15 I.L.M. 1288 (1976). The Bahamas is a party to each of these conventions.

[12] The Bahamas Merchant Shipping Act, which has been amended on numerous occasions since its enactment in 1976, governs virtually every aspect of shipping and navigation. The Bahamas' other principal laws regulating shipping include the Merchant Shipping (Oil Pollution) Act of 1976, the Merchant Shipping (Maritime Claims Limitation of Liability) Act of 1989, and the Bahamas Maritime Authority Act of 1995.

1960, and 1974. Since the 1974 SOLAS was adopted, it has been amended numerous times to keep pace with industry concerns with respect to cruise ships and other vessels—in 1978, 1981, 1983, 1988, 1989, 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. *See* SOLAS, *available at* <http://www.imo.org/ Conventions/ mainframe.asp?topic_id=257&doc_id=647>. Since 1960, the IMO has undertaken the primary responsibility for monitoring safety issues and proposing amendments, and the IMO meets regularly to consider such issues. The BMA regularly attends and participates in all committee meetings of the IMO and, as noted, holds a seat on the governing council of the IMO. In short, SOLAS is a comprehensive and responsive body of international law.

International law assigns flag states principal responsibility for enforcing these maritime design and safety standards. *See* R.R. CHURCHILL & A.V. LOWE, *supra*, at 273. Yet unlike the duty to promulgate those standards—which the flag states alone enjoy—international law recognizes that port states may play a role as well by inspecting, and where warranted, even detaining foreign-flagged ships that fail to meet international standards. *See* SOLAS, Ch. 1, Reg. 11. But, consistent with maritime law's concern for uniformity and predictability, those international standards are the *only* standards that the port state may apply during its inspection. Thus, even if the port state has adopted more rigorous requirements for its own ships, it may not hold foreign-flagged ships to that higher national standard.

A number of international conventions, including SOLAS and ILO Convention No. 147, 15 I.L.M. 1288 (1976), grant port states primary authority for inspecting and—where appropriate—detaining foreign-flagged ships that fail to meet certain minimum international design standards. *See id.* art. 4. Based on these conventions, a number of countries have formed regional pacts—in Europe, the Pacific, the Caribbean, and elsewhere—that coordinate port-state inspections. The

oldest and most established of these regional pacts—the Paris Memorandum of Understanding, 21 I.L.M. 1 (1982)—compiles an annual list ranking the overall safety of each flag state based on the number of ships from its registry that had been detained that year. The Bahamas has consistently been on the "White List," reserved for "flags with a consistently low detention record." Paris Memorandum of Understanding on Port State Control, Annual Report 2003 at 15, 27.

2. Applying Title III's accessibility rules to foreign-flagged ships would not only disrupt this carefully calibrated international framework, but also create a violent sea of potential clashes between United State law and the laws of other nations—and the community of nations. Ship design is a complex integrated process, demanding engineering expertise and enormous economic resources. A ship's design cannot change every time the ship tacks for a new port. One of the greatest virtues of international maritime law is that, by putting in place a system of bright-line rules that are promulgated by a single sovereign and backed by comity and reciprocity, ships need not overhaul their architecture each time a new country devises a new set of design standards.[13]

But if a leading maritime nation like the United States breaks from the established practice and unilaterally imposes its own structure and design standards on foreign-flagged ships, there is nothing to prevent every other flag state from taking similar steps. Indeed, such a unilateral action might prompt other nations to enact their own design codes either to *strengthen* or *alleviate* the specifications in the United States

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[13] As the IMO has observed in explaining the need for an international framework for developing safety and other maritime rules: "[S]hipping is an international industry. If each nation developed its own safety legislation the result would be a maze of differing, often conflicting national laws. One nation, for example, might insist on lifeboats being made of steel and another of glass-reinforced plastic." IMO, *Frequently Asked Questions*, *available at* <http://www.imo.org/home.asp>.

code. *Cf. McCulloch* U.S. Br. 27 (Application of United States labor law to foreign-flagged vessels "would have significant repercussions, and could lead to reprisals against American shipping by the flag countries involved."). That is one of the principal reasons this Court has historically respected the law of the flag. *See Lauritzen*, 345 U.S. at 582 ("we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided").

Such a scenario is not unrealistic and, if it ensued, "would raise considerable disturbance not only in the field of maritime law but in * * * international relations as well." *McCulloch*, 372 U.S. at 19. Some 40 nations—many of them major maritime powers[14]—have enacted disabilities-discrimination laws. At least three countries have already promulgated accessibility standards for ferries operating on their *own* registries.[15] If these and other countries were to respond to a decision by this Court extending Title III of the

[14] *See* Theresia Degener, *Disability as a Subject of International Human Rights Law and Comparative Discrimination Law*, *in* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 151, 167 (Stanley S. Herr et al. eds., 2003) (listing, among others, Australia, Canada, Germany, Korea, South Africa, Spain, Sweden, and the United Kingdom as having enacted antidiscrimination statutes regarding the disabled); Disability Rights Education & Defense Fund, *Country Laws Index*, <http://www.dredf.org/international/lawindex.html> (listing more than 40 countries with disabilities-rights laws).

[15] *See* United Kingdom, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada, Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http:// www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia, Disability Standards for Accessible Public Transport, *available at* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B?OpenDocument>.

ADA to foreign-flagged ships by extending their own disabilities laws to foreign ships, conflicts and confusion over the specifications governing the design and structure of passenger vessels could pervade international maritime commerce. Quite apart from major structural differences—such as the number of accessible elevators or cabins per floor—conflicting standards for basic design elements—such as the height of service counters, the circumference of hand railings, and the angle of coamings—would make international voyages virtually impossible. For example, the crew of a cruise ship with 200 hand rails would need to replace every one of those rails if the disability law in the next port of call specified rails a quarter inch thicker.[16]

The well-established international framework discussed above is designed to prevent such intolerable results. The international community may—as it has with many other design standards before—develop accessibility rules for cruise ships collectively through existing bodies like the IMO. Notably, the first steps in such an initiative have already been taken. In 1996, the IMO's Maritime Safety Committee—on which The Bahamas sits—issued a comprehensive set of guidelines "on the design and operation of passenger ships to respond to elderly and disabled persons' needs." IMO, Maritime Safety Comm., *Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs*, MSC/Cir. 735 (June 24, 1996). Although not binding, the IMO's guidelines served as the basis for the accessibility rules that the United Kingdom recently established for

[16] It is possible to book a voyage on the *Queen Elizabeth 2* for a 46-day cruise from Singapore to New York that stops in at least 16 different countries. But even a simple transatlantic voyage from Southhampton to New York could run aground on regulation if the United States and Great Britain each adopted and imposed a different set of structural and design requirements on the *Queen Elizabeth* and other vessels that call on their ports.

ferries. *See* United Kingdom, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, *supra*, at 3.

The IMO—"[t]he organization that has probably had the most substantial direct effect upon the law of the sea," R.R. CHURCHILL & A.V. LOWE, *supra*, at 23—provides an ideal forum for addressing this issue in a multilateral fashion. The Bahamas participated in the discussion of the IMO's guidelines on access for the elderly and people with disabilities, is monitoring the developments in other nations, and stands ready to assist in an international response.

3. Applying Title III to foreign-flagged ships also runs the grave risk that ship owners will be forced to reconcile SOLAS obligations with accessibility standards issued by the Department of Transportation. As the Department of Justice acknowledged shortly after the ADA was enacted, "[b]ecause of the unique structure of ships, *none* of the [ADA Accessibility Guidelines for Buildings and Facilities] technical or scooping standards are appropriate." U.S. DEP'T OF JUSTICE, ADA TECHNICAL ASSISTANCE MANUAL § III-5.3000, illus. 3 (1993) (emphasis added). Indeed, in its Final Report, the Passenger Vessel Access Advisory Committee (PVAAC) identified 98 specific conflicts between ADAAG and the Coast Guard's regulations implementing SOLAS. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report (Dec. 2000) (ADAAG/Coast Guard Comparison Index), *available at* <http://www.access-board.gov/pvaac/ commrept/index.htm>. And, as the Court of Appeals noted below, even after years of studying how to apply traditional accessibility standards to ships, the PVAAC was still identifying conflicts between SOLAS and proposed guidelines. *See* Pet. App. 9a n.6.

Petitioners and their amici try to downplay the prospect of such conflicts by arguing that, at least in their view and the view of the PVAAC, "the newer draft guidelines recently released by the Access Board" resolved the final conflicts.

Pet. Br. 45. But those guidelines—released more than a decade after the ADA was enacted and just days before the filing of the government's amicus brief in this case—are only in draft form, and were issued for comment. No one knows what will result from this project, much less when that process will be completed. In any event, in the end, both petitioners and the United States concede that Title III's accessibility rules—either those just proposed or others in the pipeline—might conflict with SOLAS. Their solution, however, only underscores the problem of applying domestic design standards to foreign-flagged ships in the first place. According to petitioners, the answer to any conflicts between Title III and international law governing ships should be left to "expert [U.S.] government regulators." Pet. Br. 45.

Both petitioners and the United States concede that "to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered 'readily achievable' within the meaning of Title III." U.S. Br. 27; Pet. Br. 42. The problem is that ship owners may not know whether a particular accessibility rule conflicts with SOLAS—and is therefore not "readily achievable"—until after a lengthy and expensive adjudication. Moreover, even if a vessel owner—perhaps after having paid for the services of an American lawyer specializing in ADA law—makes a good faith determination that a regulation is not "readily achievable" on his vessel, he will still face the prospect of an ADA action the moment the ship enters United States waters. The uncertainty and cost created by such a regime will have a destabilizing and highly disruptive effect on international maritime commerce.

4. It is not only the prospect of clashes between Title III and international law that will create international discord and confusion for foreign-flagged vessels. Currently, vessel owners and regulators are guided by a clear set of design and safety standards: those established by the flag state and international conventions that the flag state has adopted. If

Title III were extended to foreign-flagged cruise ships, then the owners of such vessels and flag states would be responsible for deciphering a new code. It has taken the Department of Justice more than a decade just to issue *draft* guidelines on how Title III would apply to passenger vessels. It could take years more for the government to issue final rules. Before such rules are promulgated, United States courts presumably would be required to develop structure and design requirements on an ad hoc, case-by-case basis. Moreover, even when final rules are issued, foreign-flagged vessels would have to continuously monitor how they are interpreted and applied by the hundreds of federal judges that have jurisdiction over ADA actions. Those judges are likely to lack expertise in the technicalities of maritime architecture and design. And, inevitably, United States courts will reach conflicting rulings on the application of Title III to such vessels. It would be difficult to devise a more disruptive and chaotic regulatory regime for this "delicate field of international relations." *McCulloch*, 372 U.S. at 21.[17]

[17] The United States suggests that the way out of this international conundrum is to hold that Title III applies "to foreign-flagged cruise ships, *except to the extent that enforcing ADA requirements would conflict with a treaty.*" U.S. Br. 12; *see id.* at 27. That argument fails. First, it would transform the clear-statement rule applied in this sensitive context into a narrow—and arguably superfluous—conflicts rule. Second, it would not address the enormous uncertainty that would exist over when such a conflict exists in the first place. And third, it fails to account for the fact that—quite apart from any specific conflict between Title III and a treaty—extending Title III to foreign-flagged vessels would interfere with the active international framework and body of customary international law (not limited to treaties ratified by the United States) governing vessel design and safety.

F. The Wrongful Nature Of Discrimination Does Not Sustain The Conclusion That Congress Intended To Apply Title III To Foreign-Flagged Vessels

Relying on *Wildenhus's case* and *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), the United States argues that Title III applies to foreign-flagged ships because "Title III prohibits discrimination 'of a nature to disturb the public peace' and 'of a character to affect those on shore or in port when it becomes known.'" U.S. Br. 24 (quoting *Wildenhus's case*, 120 U.S. at 17). That argument is unavailing.

Both *Wildenhus's case* and *Uravic* recognize the authority of the port state to regulate a foreign vessel that reaches its ports. They do not trump the settled canon that Congress does not intend to exercise such authority unless it clearly says so. Moreover, *Wildenhus's case* and *Uravic* have been limited to the special contexts in which they arose. *Wildenhus's case* involved a major crime—murder—aboard a foreign vessel in American waters. *Uravic* involved a maritime tort covered by the Jones Act, 46 U.S.C. § 688, which has roots in the "general maritime principles of compensation for personal injury." *Romero*, 358 U.S. at 382. Neither case supports the conclusion that Title III—which neither governs major crimes nor has roots in maritime law—automatically applies to foreign-flagged vessels.

To the contrary, in *Wildenhus's case*, the Court recognized that the flag state has an overriding interest in the regulation of the internal affairs of its ships. *See* 120 U.S. at 12. There is scarcely any matter more closely connected to the internal order of a vessel—or of greater interest to the "authorities of the nation to which it belong[s]," *id.*—than the requirements relating to the vessel's structure and design. Similarly, there is little that a port state could do that would prove more disruptive to maritime commerce than to impose its own structural or design requirements on the ships that enter its waters. That disruption is the same regardless of whether the

port state is trying to prevent discrimination aboard the ship or to ensure the safety of passengers in stormy seas.

A broader reading of *Wildenhus's case* would unduly interfere with the law of nations giving primary importance to the law of the flag. In a generalized sense, any form of discrimination represents an affront to "public peace" and "dignity." But so too, it invariably will be possible to argue that the violation of a public law affects the "public peace" and "dignity." Indeed, that is certainly true with respect to labor laws designed to prevent disruptions like picketing and boycotts. *Cf. Benz*, *supra*. Yet this Court has never subjected the jurisdictional determination of whether United States law displaces the law of the flag state with respect to the regulation of internal affairs to such an indeterminate and value-laden "public peace" and "dignity" inquiry.

Instead, this Court has adopted a clear and predictable rule to govern this crucial jurisdictional determination: in order to "sanction the exercise of local sovereignty * * * in this 'delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.'" *McCulloch*, 372 U.S. at 21-22 (quoting *Benz*, 353 U.S. at 147). Title III lacks such an "affirmative intention."

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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THE BAHAMAS

FLAG STATE PERFORMANCE SELF-ASSESSMENT FORM

For the purposes of IMO Assembly Resolution A.881(21)

GENERAL

1. Name of State **THE BAHAMAS**, *The Commonwealth of*

2. Name of Contact Person responsible for completion of this form

Director

Name of Administration

Bahamas Maritime Authority

Address

2nd Floor
Latham House
16 Minories
LONDON
EC3N 1EH
United Kingdom

Telephone Number

+44-20-7264-2550

Fax Number

+44-20-7264-2579

E-mail address

tech@bahamasmaritime.com

3. Indicate to which of the following international instruments your State is a Party and which (optional) MARPOL 73/78 Annexes have been ratified.

SOLAS 74	Yes
SOLAS Protocol 78	Yes
SOLAS Protocol 88	Yes
MARPOL 73/78	Yes
Annex III	Yes
Annex IV	No
Annex V	Yes
Annex VI	No
LL 66	Yes
LL Protocol 88	Yes
TONNAGE 69	Yes
COLREGS 72	Yes
UNCLOS	Yes

4.1	How many merchant ships of 100 gross tonnage and upwards, subject to the relevant instruments you indicated in question 3, are currently flying the flag of your State?	1,376
4.2	What is the gross tonnage of merchant ships flying the flag of your State?	29.2 million

INTERNAL CRITERIA

Legal Framework

5.	Does your Administration have the necessary laws in force to implement international maritime safety and pollution prevention instruments with regard to:	
	.1 the construction, equipment and management of ships;	Yes
	.2 the prevention, reduction and control of pollution of the marine environment;	Yes
	.3 the safe loading of ships;	Yes

	.4 the manning of ships;	Yes
	.5 the safety of navigation (including taking part in mandatory reporting and routing systems), maintenance of communications and prevention of collisions	Yes
6.	Does your Administration have the necessary laws in force to ensure the provision of penalties of adequate severity to discourage violation of international instruments to which your State is a Party?	Yes
7.	Does you Administration have the necessary laws in force to provide for ship inspections to ensure compliance with international maritime safety and pollution prevention standards, to which your State is a Party?	Yes
8.	Does you [sic] Administration have the necessary laws in force to take legal action against ships which have been identified as not being in compliance with the international instruments to which your State is a party?	Yes
9.	Does your Administration have the necessary laws in force to carry out the required casualty investigations?	Yes

Enforcement

10.	Does your Administration have an infrastructure, including personnel with appropriate technical expertise and experience, to:	

.1 identify ships flying the flag of your State which are not in compliance with international maritime safety and pollution prevention requirements? Yes

.2 take action against ships flying the flag of your State which have been identified as not being in compliance with international maritime safety and pollution prevention requirements? Yes

-If yes, against how many such ships was action taken for each of the previous 5 years*

Appropriate action is taken in every incidence in which a Bahamian ship is found not to comply with international convention safety and pollution prevention requirements.

11. Did your Administration investigate detentions by port States of ships flying the flag of your State for each of the previous 5 years*? (see also question 28) Yes

-If yes, indicate how many such detentions were investigated. All

Recognised organisations acting on behalf of your Administration

12. Which organisations has your Administration recognised for the purpose of delegation of authority under the relevant instruments you indicated under question 3?

American Bureau of Shipping (ABS)
Bureau Veritas (BV)
Det Norske Veritas (DNV)
Germanischer Lloyd (GL)
Korean Register of Shipping (KRS)
Lloyd's Register of Shipping
Nippon Kaiji Kyokai (Class NK/ NKK)
Registro Italiano Navale (RINA)

13. When your Administration delegates authority to recognised organisations, does it follow resolutions A.739(18) and A.789(19) as minimum requirements, the requirements in SOLAS 74, regulation XI/1, and the analogous requirements in MARPOL 73/78? Yes

14. Has your Administration provided IMO with a copy of the formal agreement or equivalent legal arrangements with the recognised organisations listed in question 12? Yes

15. Indicate which survey and/or certification functions your Administration has delegated to the recognised organisations referred to in question 12.

Statutory surveys and certifications in respect of

- SOLAS 74/88
- Load Lines Convention 66/88
- Tonnage Convention 69
- Marpol 73/78

Plan Approval in respect of COLREG 72

Approval of documentary aspects/ assessment of arrangements for on-board training under STCW 1978

Type approval of containers under SAFE CONTAINERS 1972

Certification and compliance documentation under various IMO codes

Verification of compliance with Code of Safety for Caribbean Cargo Ships

16. Indicate, for the instruments you listed under question 3, which survey and/or certification functions are carried out by your Administration. — None

17. Does you [sic] Administration carry out the verification and monitoring functions specified in resolution A.739 (18) ? — Yes

18. How does your Administration carry out the verification and monitoring functions specified in A.739 (18) ?
    - verbal and written communication with Organisations
    - Organisations are required to make reports to the Administration
    - vessels are required to complete at least one annual inspection survey performed by the Administration's inspectors
    - all authorised Organisations have quality systems certified to ISO 9001 or equivalent standard and also to IACS standard.

19. How often does your Administration verify and monitor the work of recognised organisations acting on its behalf? — Every 1 month(s)

20. How does your Administration take specific responsibility for international certificates issued on its behalf by dependent territories/ second registers? — n/a

    The Bahamas has only one register and no dependent territories.

21. Does your Administration have the means (financial and administrative) to ensure that thorough and prompt casualty and incident investigations into all cases of serious and very serious casualties, as defined in paragraph 4.2 and 4.3 of the Annex to resolution A.849(20), are carried out? — Yes

22. For each of the previous 5 years*, for ships flying the flag of your State:

.1 How many serious and very serious casualties and incidents were investigated?

1999	1998	1997	1996	1995
15	12	12	7	9

.2 How many such casualties and incidents were reported to IMO? All

23. Can your Administration provide to IMO, on request, evidence which shows that casualties and incidents on ships flying the flag of your State have been investigated? Yes

24. For each of the previous 5 years*, has your Administration provided IMO with the mandatory annual reporting required by article 11.1(f) of MARPOL 73/78? Yes

25. How many allegations of violations, according to article 4 of MARPOL 73/78, have been made against ships flying the flag of your State in each of the previous 5 years*?

1999	1998	1997	1996	1995
6	1	10	16	8

.1 How many investigations or legal proceedings has your Administration carried out in the previous 5 years* in accordance with articles 4 and 6 of MARPOL?

1999	1998	1997	1996	1995
6	1	10	16	8

.2 In how many cases did you [sic] Administration report back to the reporting State or to IMO in each of the previous 5 yrs* ?

1999	1998	1997	1996	1995
6	1	10	16	8

EXTERNAL CRITERIA

26. For each of the previous 5 years*, how many ships flying the flag of your State:

.1 have been involved in serious or very serious casualties?

1999	1998	1997	1996	1995
15	12	12	7	9

.2 have become total losses or constructive total losses?

1999	1998	1997	1996	1995
2	6	4	2	2

.3 have caused severe pollution**?

1999	1998	1997	1996	1995
0	0	1	0	0

.4 What casualty rate per 1000 ships does this represent?

1999	1998	1997	1996	1995
10	7	8	5	6

.5 What is the total tonnage involved as a percentage of the total fleet?

1999	1998	1997	1996	1995
0.14%	0.19%	0.06%	0.06%	0.06%

27. In each of the previous 5 years*, how many lives have been lost:

.1 in casualties involving ships flying the flag of your State?

1999	1998	1997	1996	1995
1	2	5	9	4

.2 due to occupational accidents (i.e. other than from casualties to ships) on ships flying the flag of your State?

1999	1998	1997	1996	1995
5	6	9	7	4

NB — Includes: falls; boarding or disembarking; accidents on deck and in machinery spaces; deaths in enclosed spaces; but does not include: accidents ashore; homicide; suicide; or deaths form [disease or natural causes.

28. .1 For each of the previous 5 years*, how many ships flying the flag of your State were detained, within the scope of SOLAS 74, MARPOL 73/78, LL 66 or COLREGS 72, by port States? 91/year (average)

.2 What detention rate per 1000 ship inspections does this represent? (see also question 11) 34 per 1000 ships/ year

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* or from the date your Government became a Party to the relevant instrument, if that is later.

** "Severe pollution" is a case of pollution which, as evaluated by the coastal State(s) affected of the flag State, as appropriate, produces a major deleterious effect upon the environment, or which would have produced such an effect without preventive action.

GUIDELINES FOR BMA APPROVED INSPECTORS

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1.0 Introduction and General Information

1.1 Introduction

These guidelines address the framework within which Inspectors will normally be required to operate. The purpose of this document is to consolidate BMA information, policy, and existing practices into a single document offering guidance to Inspectors. It is intended that this document will enable world-wide standards and procedures of all BMA Inspections to be carried out and reported with uniformity.

1.2 Definitions

For the purpose of these Guidelines the definitions given hereunder apply.

- BMA: The Bahamas Maritime Authority.
- Vessel: Any Bahamian registered vessel.
- Candidate vessel: Any non-Bahamian registered vessel intended for The Bahamian Register.
- Inspector: An Approved Nautical Inspector who, as an employee of the Inspection Company, has been duly authorised

by the BMA to act on its behalf in accordance with the terms of the "Agreement".

- Agreement: The terms agreed between the BMA and the Inspection Company under which the Inspection Company, will undertake Inspection services on behalf of the BMA.
- Inspection Company: A signatory to the Agreement and employer of the Inspector.
- Inspection: A Pre-Registration Inspection or Initial Inspection or Annual Inspection.
- Port State Control (PSC): A Coastal Authority authorised , under a Regional Memorandum of Understanding in conjunction with the International Maritime Organisation (IMO), to inspect any vessel operating in its national waters.
- Port State Detention: The situation where a vessel has been detained by PSC.
- Anniversary date: The date on which the vessel was first inspected by the BMA, regardless of the date on which the Inspection Certificate was issued.
- Inspection Certificate: A certificate issued to a vessel signifying that it has undergone a satisfactory Bahamas Inspection.
- Authorised Classification Societies: Eight Classification Societies authorised to act on behalf of the BMA namely:-

  Lloyds Register of Shipping
  Det Norske Veritas Korean register of Shipping
  Bureau Veritas
  Germanischer Lloyd
  American Bureau of Shipping
  Nippon Kaiji Kyokai
  Registro Italiano Navale
  Korean Register of Shipping

1.3 BMA Mission Statement

The BMA is committed to maintaining high standards of safety and environmental protection and to implement and uphold international Convention standards for the vessels under its administration and to enforce such standards fairly.

1.4 Purpose of the Inspectorate

The BMA appoints Inspectors to assist it in fulfilling its function as a responsible Flag State Administration. The purpose of making these appointments is to facilitate the inspection of or attendance on board any vessel or any candidate vessel in a timely and cost-effective manner anywhere in the world. Inspection will normally be in connection with assessing the vessels condition, onboard safety standards and technical and operational integrity; other attendance will normally be in connection with registration requirements, to carry out a casualty investigation or to represent the BMA at a Port State detention.

1.5 Quality of Inspections

It is intended that the quality of inspections should follow best industry practice. In most parts of the world there is now a coordinated approach to PSC through regional Memoranda of Understanding, this means that most ships will now undergo at least one PSC inspection during the course of any year. BMA Inspections shall endeavour to minimise the risk to a vessel of being detained following a Port State Inspection. This is not only to uphold the standards of the BMA but also to provide Owners with confidence that their vessels will pass any PSC Inspection, also that the work performed by the Classification Society is of an acceptable standard.

2.0 The Role of a Bahamas Inspector

2.1 General Role

An Inspector acting on behalf of the BMA may be required to carry out 6 tasks:

i. To conduct pre-registration inspections on candidate vessels of 12 years or older.
ii. To conduct initial inspections on vessels of under 12 years of age.
iii. To conduct annual inspections on all vessels.
iv. To attend and render general assistance on vessels detained by PSC.
v. To conduct other tasks as required by the BMA in connection with:- vessel registration; carving & marking; endorsement of certificates; verifying the existence of an Inspection Certificate etc.
vi. To conduct accident investigations.

All of the above should be conducted either in accordance with standing instructions in these notes, or special instructions issued by the BMA for a particular case. Items 2.1.i, ii & iii are normally carried out at the request of the owner as required by the BMA, whereas instructions to carry out 2.1.iv, v & vi will normally be given by the BMA.

When undertaking annual inspections, Inspectors are required to monitor the work of the Classification Societies. Therefore, an Inspector must never assume that simply because a Classification Society Surveyor has carried out an onboard survey, that a BMA Inspection is not required. When a Classification Society Surveyor is onboard a vessel at the same time as a BMA Inspector, it is preferable that that their respective tasks are carried out independently of one another.

Any Inspector undertaking work on behalf of the BMA is obliged to be knowledgeable about the type of vessel to be inspected, relevant Codes and International Conventions, the standards that should be attained by Classification Societies and with the general standards demanded by Port State Control. In order to promote high standards generally, all Inspectors must have the necessary professional qualifications, experience and competence as set out in the Agreement.

2.2 Powers of an Inspector

An Inspector is entitled to board any vessel at any reasonable time provided he can produce proper identification. Normally an Inspector should only board a vessel when he has been requested to do so either by the owner to carry out a specific inspection, or by the BMA.

When given specific written instructions by the BMA, an Inspector shall remove from a ship the Registration Certificate or any other Statutory Certificate.

3.0 Inspections

3.1 Inspection Policy

Vessels under 12 years of age, are required to undergo an Initial Inspection following provisional registration, and before permanent registration is awarded.

Candidate vessels over 12 years old (and under 20 years) require a Pre-Registration Inspection before permanent registration is awarded.

Candidate vessels over 20 years of age will not normally be granted Bahamas Registration. If, in exceptional circumstances, due to its type, history and condition, it is decided to consider a candidate vessel over 20 years of age, then it will be required to undergo a documentation review in London Office. Normally, if the documentation review is successful it will be followed by a Pre-Registration Inspection and upon satisfactory completion the vessel may be offered provisional registration.

In such cases, a Pre-Registration Inspection would not normally be initiated before the outcome of the documentation review is known.

Registered vessels are required to undergo an Annual Inspection on or around their anniversary date.

The intent and scope of Inspections is set out in section 3.3.

The following ships are exempt from the inspection provisions of these Guidelines:

i. Ships solely engaged in fishing
ii. Pleasure yachts
iii. Ships registered under: The Bahamas Port Authority Act, The Bahamas Boat Registration Act and The Bahamas Water-Skiing and Motor Boat Control Act.

3.2 Aims and Process of Inspections

The following aims and processes apply to all categories of Inspections;

3.2.1 Aims

i. To ensure that all vessels and candidate vessels comply with international Convention standards;
ii. To verify that safety management, vessel operation, maintenance and mechanical condition are being upheld in accordance with good industry practice;
iii. To monitor the standard of work carried out by the vessel's Classification Society in executing its obligations to carry out statutory surveys;
iv. To ensure that vessel standards meet the inspection requirements of any PSC.

3.2.2 Process

i. To check the validity of all statutory certificates, documents, publications, Class survey status reports, and ISM documentation;
ii. To consult with the Master and Chief Engineer (and any other personnel with whom consultation may be deemed beneficial) in order to be reasonably satisfied that they possess knowledge and experience relevant to their positions on board the vessel;

iii. To perform a physical inspection of the vessel in order to ascertain its overall condition, maintenance standards, operational integrity and onboard safety standards;
iv. To witness emergency drills and functional checks on safety critical machinery and equipment;
v. Before leaving the vessel to de-brief the Master and Chief Engineer and provide them with a signed written summary of deficiencies and/or significant observations;
vi. On completion of a satisfactory inspection, to issue a Certificate of Inspection to the Master. In the event that the inspection proves unsatisfactory an alternative course of action may be considered necessary (see section 3.3.5).
vii. Following departure from the vessel, to notify London Office by telephone or fax of any concerns and promptly prepare and dispatch a detailed report, including a comprehensive set of photographs.

3.3 Inspection Category

Three categories of inspection (see section 2.1.i.ii.iii) are discussed below. The format and scope of each category of inspection will be in accordance with the Inspection Report and guidance therein. The Inspection report along with guidance on the required scope of inspections is discussed in Appendix A.

3.3.1 Pre-Registration Inspection

The purpose of a pre-registration inspection (for candidate vessels over 12 years of age) is to assist the BMA in reviewing an Owner's application to join the Register; the primary aim of the inspection is to assess the physical condition and safety standards of a candidate vessel. Whilst an assessment of the vessel's operational integrity is also required, occasionally a pre-registration inspection will be undertaken before a vessel changes ownership and it will not be possible to fully assess certification, publications, manning and procedural / policy aspects of the vessel. Inspectors should do their utmost to complete a

substantial part of the Inspect Report, leaving the reader in no doubt as to the vessel's physical condition and the standard of safety construction, safety equipment and pollution prevention onboard the vessel.

If a candidate vessel is not undergoing a change of ownership before registration then the format of the Inspection will follow the full scope of the Inspection Report. It is intended that the inspection will be rigorous, however the level at which the inspection is carried out will be determined by the Inspector's professional judgement, based on his general observations and instinctive impression of the vessel. However, where older or apparently poorly maintained vessels are concerned then extensive coverage of all sections of the Inspection Report will be mandatory.

Inspection items which require verification after a change of ownership has taken place should be clearly highlighted in the Inspection Report.

Note that the candidate vessel being inspected will not be in possession of Bahamas Statutory Documentation and Carving & Marking Note; moreover it may not be Classed by one of the Authorised Classification Societies. These items will need to be re-inspected on a separate occasion and this requirement should be clearly highlighted in the pre-registration inspection report.

3.3.2 Completing the Pre-Registration Inspection Process

The completed report form, including recommendations and corrective actions should be forwarded promptly to London Office, together with photographs of the candidate vessel. In order to accelerate the report review process, inspectors are requested to fax (or e-mail) a copy of the report in advance of the mailed report.

3.3.3 Initial Inspection

The initial inspection shall be carried out within six months of a vessel being awarded provisional registration.

The purpose of the Initial Inspection (for vessels under 12 years holding provisional registration) is to confirm that a vessel satisfies the physical and safety standards required by the BMA and in addition can pass a thorough examination of documentation, operational and manning requirements.

Vessels under initial inspection must be Classed with one of the Authorised Classification Societies and be in possession of Statutory Certificates issued on behalf of the Bahamas.

Upon satisfactory completion of an Initial Inspection a vessel will normally be awarded permanent registration status.

The scope and reporting requirements for initial Inspections will be as described for pre-registration Inspections, also the extent to which inspectors will wish to carry out a detailed examination of the vessel will be determined by their professional judgement, based particularly on the vessel's age and initial indications.

3.3.4 Annual Inspection

Annual Inspections are required for permanently registered vessels. Inspections fall due on a vessel's anniversary date (the date upon which either the Pre-Registration inspection or the Initial Inspection were held) and may [sic] carried out within a 3 month period before or after the anniversary date. This is to allow the Owner some flexibility to have an inspection when it is operationally convenient.

Regardless of when the Inspection is actually undertaken, the date on which the next inspection falls due will remain fixed at 12 months after the anniversary date.

The objective of the Inspection is the ongoing verification of a vessel's, standard of maintenance and operational safety and its compliance with international Convention standards, to monitor the effectiveness of the Classification Society in carrying out statutory work on behalf of the BMA and to monitor the vessel's overall status in relation to PSC requirements.

The Inspection should provide both the BMA and the Owner with a comprehensive impression of the vessel according to the above criteria and to identify any shortcomings or deficiencies requiring corrective action.

Whilst the scope of the inspection will follow that set out in the inspection report, the required level of detailed examination will normally depend on the vessel type, age, history and importantly the Inspector's professional judgement. Inspectors shall nevertheless be particularly cognisant of vessels of 12 years of age or older.

The standard of the Inspection should be such as to verify compliance with applicable rules and regulations so as to minimise any likelihood of the vessel becoming the subject of a PSC detention. It is impracticable to define a sub-standard ship solely by reference to a list of qualifying defects. An Inspector should use his professional judgement to determine whether a vessel is at risk; whether to make a recommendation to stop the vessel going to sea until the deficiencies are corrected or whether to allow it to sail with deficiencies that are not vital to the safety of the ship, its crew or passengers, having due regard to the particular circumstances of the intended voyage.

3.3.5 Completing the Initial and Annual Inspection Processes

On completion of both the Initial and the Annual Inspection it will be necessary for the Inspector to decide which of the following two categories applies to the vessel and hence what action to take before leaving the vessel:-

(a) No serious deficiencies reported: - The vessel is considered satisfactory and the Inspector may issue an Inspection Certificate to the Master together with a written summary of any observations or minor corrective actions required. When an Inspection Certificate is issued its expiry date should equate to the vessel's inspection anniversary date and not necessarily to a full 12 month period. The inspection anniversary date may be obtained from London office. It is

not permissible to issue a conditional or short term Inspection Certificate under any circumstances;

(b) Deficiencies reported: In the event of an unsatisfactory inspection then Inspectors should decide on one (1) of the following three options:-

(i) It is possible to correct the deficiencies before the vessel sails: The Inspector should offer to return to the ship to sign off corrective actions and if satisfied to issue an Inspection Certificate to the vessel (see 3.3.5 (a));

(ii) It is not possible for the vessel to correct the deficiencies before sailing: Provided that the deficiencies do not constitute a serious risk to the safety of the vessel and its personnel, the vessel may be allowed to sail. An Inspection Certificate should not be issued. The Master should be informed in writing (using the form **SAFESUM**) that another inspection has to be carried out at the vessel's next port of call. Inspectors should promptly advise London office by fax, copying the Vessel's Managers.

Note: Situations may arise where the corrective action would require input by the BMA eg. issuance of a safe manning certificate or Bahamian officer's licences. Such situations would not normally require another inspection. The Master should be instructed to follow up the required action; if no other corrective action is required then an Inspection Certificate should be issued.

(iii) The deficiencies are such that in the opinion of the Inspector the vessel should not be allowed to sail in its present condition: Under no circumstances should a Safety Certificate be issued. Inspectors should immediately consult with London Office who may authorise the Inspector to remove Certificates from the vessel and effectively detain it until repairs have been carried out and the vessel re-inspected.

4.0 Attending Vessels under PSC Detention

4.1 General

A detained vessel reflects badly on The Bahamas Maritime Authority.

Every detention requires follow-up action. It is mandatory that any action taken by the BMA shall be reported to the detaining state, to IMO and to the Classification Society (if it has been party to the detention).

If a detention is notified to the BMA whilst the ship is still under detention, then it may be necessary for an Inspector to attend the vessel during the detention. In such situations attendance by an Inspector shall only be undertaken on the instruction of London Office.

An inspector attending a PSC detention should try to ascertain whether the reported deficiencies should have been highlighted by recent Class surveys or Bahamas Inspections.

4.2 Actions to be taken by the Inspector

The following procedure should be adopted by Inspectors attending a detained vessel.

4.2.1 Vessel detained

An attending Inspector will receive instructions from London office in connection with the vessel's circumstances and the information that he will be required to report. BMA London Office will notify the vessel's Owner and arrange for the Inspector to attend the vessel. BMA London Office will also liase directly with Classification Society and ISM issuing authority (if applicable and if a different organisation from Class) in connection with the PSC detention.

The inspector should report to London office by telephone once a preliminary assessment of the situation has been made. A joint decision regarding further action will be taken at the time.

Although in general the Inspector should try to facilitate the vessel's release from detention, under no circumstances should he be party to its departure until all necessary corrective actions have been carried out.

If either the Owner or Master show any inclination to omit any necessary work or to leave before everything is in order, the inspector should seek authorisation to remove the vessel's Statutory Certificates and Certificate of Registry.

On completion of the above tasks a written report should be submitted to London office.

4.2.2 Vessel released

Circumstances permitting, it is recommended that if in doubt about the vessel's integrity then an inspection should be carried out to the level of an Annual Inspection. This will have the dual effect of conveying the actual condition of the vessel to Owners and to the BMA and recommending corrective action of any deficiencies that the Inspector feels would be in the Owner's interest in order to avoid further risk of detention by other PSC Authorities.

If the detention appears to be unjustified, then London office should be informed in order that an appeal may be lodged with PSC.

5.0 Other tasks for Inspectors

5.1 Registration

From time to time Inspectors may be required to carry out ancillary tasks in connection with the vessel registration:

5.1.1 Stamping and Signing of Carving and Marking Notes

Carving and Marking Notes are issued to Owners by the BMA Registrar. During his attendance onboard the vessel, the Inspector is required to witness both the internal and external Carvings and Markings and to endorse the Note accordingly. Inspectors should

immediately fax a copy of the endorsed Carving and Marking Note to the Registrar, with the original to follow by mail.

Where a Carving and Marking is to be witnessed then it should be understood that the BMA requires that the vessel's name and port of registry marked on the outer hull shall be marked conspicuously and permanently, ie. not simply painted over the old marks; weld beading or equivalent should be employed.

Where, for justifiable reason, e.g. hot-work requires a tanker to be gas freed, an Owner/Master feels that this requirement cannot be met, the BMA should be notified stating reasons and advising a date and place where it is intended to implement permanent changes to hull markings. The BMA may then authorise painted marks to be accepted as temporary markings. Inspectors are not authorised to accept such temporary marks without approval.

Similarly the vessel's official number and registered tonnage should be permanently marked inboard in a conspicuous position. A dispensation from this requirement will only be permitted through consultation with London office.

5.1.2 Endorsement of Registration Documents

Typical Registration Documents that routinely require to be endorsed onboard a vessel by an Inspector are; Registration Certificate, Safe Manning Certificate, Safety Radio Certificate. Any endorsement of a vessel's Registration Document is to be undertaken by an Inspector only upon receipt of written authorisation by the Registrar or person deputising for the Registrar.

5.1.2.1 Vessel Name or Tonnage

Upon instructions from the Registrar, Registration Documents may require to be endorsed with a change of vessel name or tonnage in accordance with the completed Carving and Marking Note. Copies of endorsed documents should be immediately faxed to the Registrar. The original documents should be retained onboard.

5.1.2.2 Owner's Name and Address

Upon instructions from the Registrar, Inspectors may be required to endorse Registration Documents with a change of Owner's name and address. Copies of endorsed documents should be faxed to the Registrar, original documents should be retained onboard.

5.2 Verification of existence of a valid Inspection Certificate

i. Vessel Inspection dates are communicated to vessel owners by the BMA and owners are thereafter [sic] it is an owners responsibility to arrange for a timely inspection of the vessel to be carried out. If a vessel's Annual Inspection appears not to have been carried out within 15 months from the vessel's anniversary date, then an Inspector may be called upon to attend a vessel in order to ascertain whether the vessel has been inspected or not. This situation may have arisen due to an oversight by the previous Inspector in not submitting an inspection report, or because the Owner has neglected to arrange for an inspection to take place.

   The BMA will normally notify the vessel's owner in advance that an Inspector will be attending the vessel and the reason for his attendance.

   When the Inspector goes onboard, he should explain the purpose of the visit to the Master and ask to sight a copy of the latest Annual Inspection Report and Safety Certificate.

ii. If a valid Inspection Report and Safety Certificate are available, then the Inspector should note the name of the Inspector who performed the inspection, the port at which it was carried out and the date of Inspection. The visit can then be concluded.

iii. If a valid Inspection Report and Inspection Certificate are unavailable, then a request should be made to sight all of the vessel's certificates (see the SAFECERT section of the Inspection

Report Form) including the vessel's Registration Certificate, Class and Statutory Certificates: -

- The Inspector should inform the Master that the vessel requires an immediate Annual Inspection and obtain his agreement for the inspection to be undertaken forthwith. At the same time, Inspectors should report the situation to the London office and be guided accordingly.
- If any of the vessel's Statutory Certificates are found to be invalid the Master should be instructed to have the necessary surveys carried out by Class prior to sailing and verified by the Inspector. If the Master is unable to comply with this request, then the London office should be consulted immediately.

6.0 Accident Investigation

6.1 General

When an Inspector is requested to carry out an accident investigation he should follow the Guidelines in Appendix B, in addition separate instructions will be issued dealing with the specific requirements of the case in question.

7.0 Appendices

Appendix A - Inspection Report

General

The following notes, to be read in conjunction with Section 3.0 of the Guidelines, are intended to assist Inspectors in carrying out inspections and presenting a report and comments in a standard structured format. The Inspection Report Form has been compiled as a stand-alone document.

All Inspections will follow the format set out in the Inspection Report Form. The Report Form comprises the following sections:

SAFEDAT - general vessel information

SAFESUM - summary of findings, 1 copy to be left onboard
SAFECERT - standard certificate questionnaire
SAFENAV - navigation equipment
SAFECREW - crew management
SAFEDECK - hull, decks and fittings
SAFEQUIP - lifesaving apparatus & fire fighting equipment
SAFENG - machinery spaces
SAFEPASS - passenger ship supplement
SAFETANK - tanker, chemical & gas carrier supplement

During the limited time available onboard it will not be possible to inspect every item closely, nor should it be necessary to do so. For Initial and Annual Inspections, a preliminary cursory look around the vessel will indicate whether the vessel is being operated and maintained correctly. Assuming positive indications, then the physical inspection procedure should be a sampling process rather than a detailed item by item examination. A more rigorous approach, particularly with regard to physical condition, will be required for Pre-registration Inspections.

Inspectors shall apply standards to inspection and reporting that are consistent with the stated aims and objectives of the BMA (Section 3.2.1). On completion of the inspection, the Inspector should summarise, on form SAFESUM, any deficiencies or observations arising and issue a copy to the Master before leaving the vessel.

Inspection Reports should be completed in triplicate by the Nautical Inspector, the original should be forwarded to London Office, with one copy being forwarded to Owners (except with pre-registration inspections where Owner's may request a copy from London Office) and the remaining copy being retained by the Inspector. Photographs should be included as part of Pre-registration and Initial Inspections, but need not be included with Annual Inspection Reports.

The Inspection Report Form has been formatted to enable it to be compiled electronically. It is expected that both Inspection Reports

and photographs shall be increasingly communicated by e-mail, therefore all Inspectors will be expected to acquire the necessary resources to accomplish this objective in the shortest possible time. It is intended that subsequent revisions to any section of the Report Form will be distributed to Inspectors by e-mail.

In general, all Inspections shall include the following function tests on critical items:-

- Witnessing of fire drill, boat muster and lowering of at least one lifeboat, provided that local port regulations permit;
- Activation of main and auxiliary steering controls;
- Changeover and operation of emergency steering gear;
- Starting of emergency generator;
- Remote starting of emergency fire pump;
- Operation of a sample of ventilation fan dampers.

Content of Report Form

The Inspection Report is divided into ten sections namely:-

(i) **Vessel Data (SAFEDAT):** In addition to recording vessel data, Inspectors should ensure that that their recommendation is recorded and that the data sheet is signed and dated by the Inspector (also stamped) and by the Master or an Owner's representative.

(ii) **Summary of observations and action items (SAFESUM):** A copy of this page should be issued to the Master before the Inspector leaves the vessel. It is extremely important that any observation or deficiency requiring corrective action, or any item that is reported negatively in any of the following eight sections of the Report should be clearly highlighted in this summary section.

(iii) **Certificates and Documents (SAFECERT / SAFEDOC):** Original Certificates should be sighted along with the documents and publications required to be carried on board Bahamian vessels. It

is not necessary to physically check every document and publication, the presence of these may be verified by sampling and by sighting the ship's document check list. Note that further information relating to documents and publications required on Bahamian ships can be obtained from the publication "An Officer's Guide to the Merchant Shipping Legislation of the Bahamas", a copy of which should be on board.

(iv) **Navigation (SAFENAV):** Bridge organisation and procedures, passage planning and the professional application of ship handling and navigation practices should be evident. Bridge equipment and radio communications equipment should be witnessed as fitted and confirmed to be in good operating condition either verbally by ship's staff, by log book / test record entries, or by operation. Inspectors should ascertain that periodical checks of navigation equipment are made at sea. Inspectors are not normally required to test bridge equipment.

Bridge Procedures Guide and Standing Orders, including Master's Night Order Book, should be sighted to ascertain that all officers are certain as to their responsibilities.

Log books, passage planning and corrected charts should be inspected in order to ascertain whether actual procedures reasonably follow the vessel's Bridge Procedures Guide.

(v) **Manning & STCW (SAFECREW):** The vessel's actual manning should be checked to ensure that it meet the Minimum Safe Manning Certificate requirements. Also the schedule of watch-keeping and rest periods should be sighted to ascertain that normal work hours and rest periods are such as to minimise fatigue and comply with regulations. The ability of officers and crew to communicate in a common language should be noted, also the presence of English Language signs and notices around the vessel. The Official Log Book, Oil Record Books and Muster Lists must also be available in the English language.

Inspectors must check visually whether all officers possess valid certificates of competency and related Bahamian licences (watch-keeping officers) relative to their rank, including any required endorsements eg. dangerous cargo endorsement, pertaining to the particular type of vessel being inspected. Evidence of application for a Bahaman License should be available if a current licence is not held.

Where a radio officer is not carried (as permitted by the safe Manning Certificate) at least one deck officer, other than the Master, should be in possession of both a national and a Bahamian GMDSS Operator's Certificate.

A visual check should be made of officer and crew certification, training and documentation in order to ascertain that it is in accordance with STCW 95, bearing in mind the transitional arrangements, including familiarisation and basic safety training, GMDSS, fire fighting, survival craft, tanker safety, passenger ship training and medical care.

(vi) **Hull weather decks & superstructures (SAFEDECK):** For Pre-registration Inspections and Initial Inspections, safe conditions permitting, a careful examination should be undertaken [sic] selected hold spaces, cargo tanks, ballast tanks and void spaces for signs of damage, wastage, coating breakdown and indicative standards of maintenance.

During an Annual Inspection it is not normally necessary to carry out an in-depth inspection of the vessel's structure. It will be necessary to observe the general condition and appearance of the outer hull, deck plating, structures and fittings, ladder-ways, guard-rails, pipe coverings etc.

Signs of extensive damage, wastage, cracking, detachment, deformation or stiffening in decks and hull may warrant closer examination at the discretion of the Inspector. Any areas which

in the Inspector's opinion may give cause for concern should be photographed and noted in SAFESUM.

(vii) **Safety equipment (SAFEQUIP):** The effectiveness of life saving appliances depends on good maintenance by the crew and their use in regular drills. The lapse of time since the last Safety Equipment Survey can be particularly important if the equipment has not been properly maintained and regularly operated by the ship's crew.

A representative sample of lifesaving apparatus should be checked and an indication obtained that that the required number of life saving apparatus is on board.

With reference to lifeboats, Inspectors should check for obvious defects such as holed boats, seized components or malfunction of equipment. Checks should be made for signs of disuse of or obstructions to boat launching equipment; for example, paint accumulation, seizing of pivot points or braking devices, lack of greasing and poorly maintained blocks and falls may give cause for concern. Lifeboats should be correctly stored with fuel, food rations, water, spare parts and basic tools.

If in the opinion of the Inspector the life saving equipment onboard the vessel is considered to be below the required standard then this should be treated as a serious deficiency.

With regard to fire fighting equipment, the availability, condition and inspection dates of portable extinguishers, fire hoses, hose boxes and appliances, especially in the accommodation, galley and public areas is, particularly important.

Similarly, attention should be given to the effectiveness of escape routes by ensuring that vital doors are not normally locked and that alleyways and stairways are not obstructed.

The availability and condition of fire pumps and ventilation closing devices are to be regarded as being of primary importance to the fire-safety of the vessel.

If in the opinion of the Inspector the standard of fire fighting equipment and/or the fire risk onboard the vessel is considered to be unacceptable then these should be regarded as serious deficiencies.

ISM Code:

The ISM Code was introduced in order to ensure the safe operation of the ship and also provide a direct link with the most senior management via a "Designated Person".

The following ships are required to carry valid ISM Code certification:
All passenger ships, including passenger high speed craft, oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 gross tonnage upwards

Other cargo ships and mobile offshore units of 500 gross tonnage and upwards will be required to carry valid ISM Code certification not later than 1 July 2002, though such vessels may have such certification ahead of the dead line

Inspectors should be familiar with the ISM Code and during their time onboard should note any inconsistencies with the requirements of the Code. It is necessary to confirm the presence of an ISM Safety Management System (SMS), however it is not necessary to examine the SMS documentation.

Inspectors are required to verify that the following ISM Code Certification is displayed in a prominent position: -

- A copy (photocopy or faxed copy) of the Document of Compliance (DOC), or Interim DOC, issued to the Company responsible for the safe operation of vessel and

- An original Safety Management Certificate (SMC), or Interim SMC, issued to the vessel.
- The name and location of the Designated Person Ashore (DPA)

Additionally, Inspectors are required to verify that:-

- The DOC and SMC are valid and have been issued on behalf of the Bahamas (not another administration);
- The DOC and SMC have been issued by either one of the eight BMA recognised Classification Societies, or an approved administration (this information should be obtained from the BMA);
- The name of the Company on the DOC and SMC is the same as that operating the vessel, and whose Safety Management System documentation is onboard;
- The DOC specifies that the Company is permitted to operate the type of ship that is being inspected;
- The ship particulars on the SMC are correct;
- Except for Interim ISM Certificates, that Page 2 of the DOC and SMC have been endorsed, indicating that periodical audits have been carried out in a satisfactory manner and the validity of the DOC and SMC is being maintained.

  Note: a +/- 3 month window is applicable for annual company audits

(viii) **Machinery Spaces (SAFENG):** The condition of the machinery and electrical installations should be such that they are capable of providing sufficient continuous power for propulsion and auxiliary services. Through consultation with personnel along with a careful inspection of the machinery spaces, Inspectors should ascertain the availability of standing orders and emergency procedures, the availability of critical machinery,

safety & fire-fighting systems, the presence of effective pollution prevention control measures and that safe working practices and procedures are being adhered to. During the inspection of the machinery spaces the Inspector should form an impression of the standard of house-keeping and maintenance being practised.

(ix) **Passenger Ship supplement (SAFEPASS):** This supplement should be used, in addition to the foregoing sections, when inspecting Passenger Vessels or Passenger Ro-Ro Vessels.

Inspectors should familiarise themselves with the vessel's fire detection and alarm systems, fire fighting systems, fire door and watertight door arrangements. Test records should be sighted to ascertain that all equipment is being tested periodically. Sample function testing of fire and water-tight doors and alarms should be carried out, as well as a general visual inspection to ascertain that good standards of maintenance are being applied.

Communication systems, signals, notices, and guidance to passengers in the event of an emergency also need to be to the satisfaction of the Inspector. Emergency exits, particularly from public spaces, should be seen to be unobstructed and not able to be locked under any circumstances.

Procedures for crowd control, mustering and evacuation should be witnessed and there should be evidence, probably log entries, that the procedures are being followed in practice and that drills are held onboard as necessary.

(x) **Oil and Chemical Tankers, Gas Carrier supplement (SAFETANK):** Before entering a pump room or other enclosed space the atmosphere should be tested in the presence of the inspector with portable gas /O_2 analysers.

Particular attention should be paid to pump rooms on oil and chemical carriers and to cargo compressor rooms on LPG/LNG carriers. All pump and compressor seals should be tight with no leakage, ventilation systems should be working at the time of the

inspection, light fittings and switches should be of an approved gas tight type, bilges should be clean. Ventilation flaps or devices should be operable. If the cargo-pump or compressor prime movers are located in the engine room or in a separate motor room then bulkhead seals should be in good condition and free of leakage.

If the inert gas plant is in use at the time of inspection, the plant, deck non-return valve and deck seal should be inspected and the oxygen recorder / alarm in the CCR should be sighted. The inert gas log for previous voyages should be inspected in order to check the O_2 levels under normal running conditions.

The Emergency Shut Down (ESD) system test log should be sighted to ensure that the ESD is working satisfactorily.

On tankers, the cargo venting system, PV systems, IG lines, mast risers, high velocity vents and vent stacks should be seen to be in a satisfactory condition.

In gas carriers tank domes and associated fittings and deck pipelines should be in a satisfactory physical condition and free of leakage and gas detectors should be operational as shown on the test and calibration records.

Appendix B - Accident Investigation

Administration of investigations

All matters relating to accidents to ships and investigation of accidents should be addressed to the London office of the Authority. The emergency number is available for urgent out of office hours communications.

Notification of accidents

Shipowners and shipmanagers are required by section 191 of the Merchant Shipping Act to notify the Bahamas Maritime Authority of accidents to ships involving serious injury or loss of life or where a

ship has sustained material damage affecting seaworthiness. Inspectors are also requested to bring to the attention of the Authority any casualties which may come to their attention. A form for reporting of casualties by masters is available. Information on casualties may however be submitted in any form, and by the most direct means.

Investigation

On receipt of advice of a casualty, a decision will be made as to the scope of the investigation required. In case of minor casualties, involving no loss of life or serious damage to the ship, it may not be necessary to conduct an on site investigation. In other more serious cases, an investigation will be carried out by an inspector on behalf of the Authority. In such cases, arrangements will be made with the inspector, who will be authorised to conduct the investigation. Guidance on the scope and extent of the investigation, will be issued to the inspector concerned. In all cases the objective of investigations are to:

- Establish the facts
- Determine the cause of the casualty
- Identify any measures which might prevent a recurrence

Inspectors costs incurred in accident investigations carried out at the request of the Authority should be recovered from the owner of the vessel concerned.

Report of investigation

On completion of an investigation, a report should be submitted as soon as possible to the Authority. The report should include:

- Particulars of the vessel
- Factual narrative of events
- Comment and conclusions
- Any recommended preventative measures

- Annexes, containing, where appropriate, copies of original documents such as charts, log books, certificates, photographs etc.

Major casualties

In case of major high profile casualties, officers of the Authority will attend to conduct the investigation, and may request the assistance of local inspectors in such cases.

Supreme Court, U.S.
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(17)

No. 03-1388

IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE JONATHAN M. GUTOFF IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether and to what extent Title III of the Americans With Disabilities Act, 42 U.S.C. §§ 12181-12189 (2000) ("Title III"), applies to companies that operate foreign-flag cruise ships within United States waters.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae is an Associate Professor of Law at Roger Williams University School of Law in Bristol, Rhode Island. His main teaching and research interests are maritime practice procedure. Professor Gutoff's courses include Admiralty, Marine Pollution, Maritime Practice and Procedure and Salvage. For three years, from 2001-2003, he was Acting Director of the Marine Affairs Institute at Roger Williams, which, with the University of Rhode Island's Sea Grant program, sponsors symposia, research, community outreach and a joint J.D.-Master of Marine Affairs program. In addition to various presentations at symposia sponsored by the Marine Affairs Institute, Professor Gutoff has presented his work at conferences and symposia sponsored by the Universities of Pisa and Genoa, the Luso-American Foundation and the Association of American Law Schools. Professor Gutoff's work has been widely cited in articles on maritime law and international law. In addition his works have been cited by courts, including this Court, *see Lewis v. Lewis and Clark Marine, Co.*, 531 U.S. 438, 444 (2001), and by scholarly works on federal jurisdiction. *See, e.g.,* Richard H. Fallon, *et al.*, Hart and Wechsler's Federal Courts and the Federal System, 737, 738, 931 (5th ed. 2003). As a teacher of, and writer on, maritime law, Professor Gutoff has an interest in the consistent and principled application of that body of law in accord with the realities of the maritime industry.

SUMMARY OF ARGUMENT

First, since the end of the Second World War, the maritime world has seen various nations open their vessel registries to vessel owners of all nations, no matter the lack of connection between the vessel being registered and the nation operating

1. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Roger Williams University School of Law, which paid for the printing of this brief through Professor Gutoff's research account, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

the registry. These so-called "open registries" or "flags of convenience" generally give over their obligation to inspect and regulate vessels registered with them to private classification societies, which inspect vessels for their compliance with various requirements to ensure their safety at sea. Accordingly, nations with open registries do not have their sovereignty wrapped up with the vessels in their registries. Some nations with open registries do not have a strong sovereign presence at sea, and, some cannot be said to be fully functioning sovereign nations. Accordingly, the presumption, employed by the court below, that United States law applied to a foreign flagged vessel within United States waters would impinge the sovereignty of the flagging nation makes no sense in light of the current reality of the shipping industry in general and the cruise ship industry in particular; for, the vast majority of cruise ships fly flags of convenience and are under control not of sovereign nations, but of commercial classification societies.

Second, because a claim of discrimination by a cruise ship passenger aboard the vessel involves a claim arising out of a maritime contract and a maritime tort, the choice of law involved for such a case should be the choice of law principles established by this Court. Under these principles the law of the flag of the vessel involved is only one factor, of at least eight, to be considered. Where the flag is a flag of convenience the law of the flag should not be given very much import. Because the requiements of Title III are very much like duties imposed by the general maritime law and do not regulate the relation between employers and employee, or between the officers and crew, of foreign vessels, the general maritime law principles of choice of law should determine whether Title III applies to a foreign flagged vessel.

ARGUMENT

I.

FLAGS OF CONVENIENCE GRANTED BY NATIONS WITH OPEN REGISTRIES REPRESENT A COMMERCIAL DECISION BY VESSEL OWNERS RATHER THAN A SOVERIGN INTEREST OF THE FLAGGING NATION.

The decision of the Fifth Circuit below was based, in part, on the consideration that to apply Title III to foreign flagged cruise ships in United States waters would impinge upon the sovereignty of the nations providing those vessels with a flag. This holding is based on a misperception of the maritime industry in general and the cruise ship industry in particular. Today, many nations open their ship registries to vessel owners from around the world. These nations, for the most part, delegate their control over their merchant marine to a variety of classification societies, organizations that were founded to serve the insurance industry and provide certificates of compliance with various safety regulations. The decision of a vessel owner on where to flag its vessel is based on commercial convenience. This is especially true of the United States cruise ship industry, cruise ships operating out of the United States are, with one exception, only nominally connected to the nations whose flags they fly.

A. Background of Flags of Convenience.

The registration of a ship with a particular nation gives that vessel the protection, indicated by the flag, of the registering nation in return for an agreement by the owner and operator of the vessel to follow the registering nation's law. N.P. Ready, Ship Registration 8-9 (1991). Until recently the purpose of a nation state in maintaining a registry of merchant vessels was to be able to take advantage of their shipping capacity in time of war. Robert Rienow, Test of the Nationality of a Merchant Vessel 155- 57 (1937). It is therefore interesting, if not ironic, that the practice of registering ships with nations other than that of their owner or their base of operation has its modern

origins in the period preceding this country's entry in the Second World War. The federal government encouraged carriers bringing war material to the United Kingdom to register their vessels in Panama to avoid United States neutrality law. William Langweische, The Outlaw Sea 5 (2004).[2]

Following the Second World War, United States vessel owners became aware of the great cost savings of Panamanian registry as it freed them from United States shipping regulations. *Id.* Similarly, with encouragement from the State Department the Liberian registry was created by American oil companies for their tankers both as a means of avoiding United States regulations and a tool for foreign aid. *Id.* at 6. As this Court observed in 1953, "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." *Lauritzen v. Larsen*, 345 U.S. 571, 587 (1953).

In the 1980s a large number of other nations started opening up their registries to the owners of vessels from around the world. Since then the number of open registries and vessels flying those registries flags has continued to grow. The nations providing open registries gain income from the registration fees and any taxes they may impose. The vessel owners gain freedom from regulation and, very often, taxes from the countries in which they are located or where they base their operations. Vessel owners shop around for registries that will provide them with the best possible conditions in terms of fees, regulation and access to various markets, and registries compete with each other

2. Some trace the origins to the desire of vessel owners to avoid the prohibition-era ban on the sale of alcohol aboard U.S.-registered vessels. *See* H. Edward Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives* 21 Tul Mar. L.J. 139, 156 (1996). This Court has held, however, that the national prohibition against alcoholic beverages applied to foreign flagged vessels voluntarily entering United States waters. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923).

for the business of vessel owners. Indeed there is a commercial website on which subscribers can, with the click of a mouse, comparison shop among various ship registries to find the registry best suited, in terms of cost and regulatory environment, for a vessel owner. *See* http://www.guidetoshipregistries.com (last visited Nov. 20, 2004).

For example, one nation that has recently started providing an open registry is landlocked Mongolia. Its maritime code was drafted by a Mongolian scholarship student in the Soviet Union who had accidentally been directed to study deep sea fishing, rather than fish farming. The law went into effect in 1999 and the registry opened for business in 2003. According to the administrator of Mongolia's registry, the registry earned Mongolia about $200,000 in 2003 and this year Mongolia is receiving 20-30 new registrations per month. James Book, *Landlocked Mongolia's Seafaring Tradition,* N.Y. Times, Jul. 2, 2004, sec.W, p.1 col.3.

A more troubling example is that of Liberia, whose registry contains more vessels than that of any other nation. Liberia currently administers its registry though International Registries, a firm located in Vienna, Virginia, and has its headquarters in New York. While the Liberian registry is notably successful in attracting vessel owners, it can hardly be said to represent the sovereign control of Liberia over the vessels registered in its name; for Liberia has only recently concluded a violent civil war in which large numbers of the populace were displaced and subject atrocities. *See generally* United Nations Consolidated Appeal Process , Liberia: Mid-Year Review (2004) (describing the current conditions in Liberia and the need for humanitarian aid). Currently, the United Nations is attempting to disarm and relocate over 50,000 armed men and women, and as of the middle of this year the U.N. had received only one-third of the estimated 12-20 million dollars needed to complete the initial stage of disarmament. Somini Sengupta, *Young Guns for Hire, Warriors in West Africa Need Jobs As Well as Peace Treaties,* N.Y. Times, May 23, 2004 sec.1 p.5 col.1. To be sure

the money gained by Liberia from its registry provides much needed foreign exchange for that country; however, aside from the controls of provided by its offices in the United States, Liberia cannot, and does not, exercise any effective control over the vessels in its merchant marine.

B. The Mechanics of Open Registries and Flags of Convenience.

The current understanding of a flag of convenience is the nationality provided to a vessel by an open registry. The characteristics of these registries were first comprehensively articulated in 1970 by the United Kingdom in what is generally known as the "Rochedale Report." *See generally* Committee of Inquiry into Shipping: London, H.M.S.O. 1970, Cmnd 4337. According to the Rochedale Report there are six characteristics of a flag of convenience:

> (1) the country of registry allows ownership and/or control of its merchant vessels by non-citizens;
>
> (2) access to the registry is easy; ship may usually be registered at a consulate abroad and, equally important, transfer from the registry at the owner's option is not restricted;
>
> (3) taxes on the income from the ships are either not levied locally or are very low, and registry fees and an annual fee, based on tonnage, are normally the only charges made;
>
> (4) the country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments;
>
> (5) crewing of ships by non-nationals is freely permitted; and

> (6) the country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.

Id. at 151.

1. National and Open Registries Compared.

A comparison between the flagging requirements of the United States and the four registries providing flags of convenience for the major cruise lines operating out of the United States—Bahamas, Bermuda, Liberia and Panama[3] — will provide a ready illustration of how a flag of convenience differs from a flag issued by a national registry. The United States requires a registered vessel to be over 5 tons and is open only to

> (1) an individual who is a citizen of the United States;
>
> (2) an association, trust, joint venture, or other entity—
>
> > (A) all of whose members are citizens of the United States; and
> >
> > (B) that is capable of holding title to a vessel under the laws of the United States or of a State;
>
> (3) a partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States;

---

3. There are many more open registries. The International Transport Workers' Federation lists 28 registries as providing flags of convenience: Antigua and Barbuda; Bahamas; Barbados; Bermuda; Bolivia; Burma; Cambodia; Cayman Islands; Comoros; Cyprus; Equatorial Guinea; the German International Ship Registry; Gibraltar; Honduras; Jamaica; Lebanon; Liberia; Malta; Marshall Islands; Mauritius; Mongolia; Netherlands Antilles; Panama; Sao Tome and Principe; St Vincent; Sri Lanka; Tonga; and Vanuatu. *See* http://www.itf.org.uk/English/flagsconvenience/countries (last visited Oct. 16, 2004).

(4) a corporation established under the laws of the United States or of a State, whose president or other chief executive officer and chairman of its board of directors are citizens of the United States and no more of its directors are non-citizens than a minority of the number necessary to constitute a quorum;

(5) the United States Government; or

(6) the government of a State.

46 U.S.C. § 12102 (2000). In addition Congress has imposed strict crewing requirements. If a vessel is built with United States subsides then all of the crew must be United States Nationals, and, in any event one-quarter of a U.S. registered vessel's crew must be citizens of this country. 46 U.S.C. § 8103(b)(1)(B) (2000). Moreover, the master, chief engineer, radio operator, and all deck and engineering watch officers must be citizens of this country.46 U.S.C. § 8103(a) (2000). United States ships are subject to inspection by the Coast Guard for compliance with United States shipping law and regulations. All this is in great contrast to requirements offered by flags of convenience.

Liberia officially requires vessels in its registry to be owned by a Liberian national entity, however, that entity may be a corporation. *See* International Ship Registry Review, The Official Guide to Ship Registries, 233 (2002). Incorporation in Liberia is task that may be accomplished in a single day. *See* http://www.liscr.com (last visited Nov. 19, 2004). Moreover, the ownership requirements may be waived when the owner qualifies and secures registration as a Foreign Maritime Entity. The Official Guide to Ship Registries at 233. Vessels up to twenty years of age may be registered, although the age limit may be waived. The Official Guide to Ship Registries at 236, and Liberia, allows vessels in its merchant marine to be inspected

by 10 separate classification societies. *See* http://www.liscr.com (last visited Nov. 19, 2004).[4]

Registration in the Bahamas, with the Bahamas Maritime Authority in London, England, requires neither corporate nor beneficial local ownership, The Official Guide to Ship Registries at 22, and there are no crewing requirements. *Id.* at 25. The minimum wage of crew members and union recognition is up to the vessel owner. *Id.* The Bahamas imposes no corporate tax and international business corporations are exempt from capital gains, real estate, inheritance, sales and customs taxes. *Id.* at 23. Income from vessels and capital gains on vessel sales is tax free. *Id.* Bahamas offers registration to vessels over 1,600 tons and less than twelve years old; however, exemptions may be granted. *Id.* at 24-25. Eight classification societies are authorized to inspect vessels for the Bahamas[5], and initial registration requires a vessel to be surveyed by a number of private surveyors located around the world. *Id.*

The Bermuda Registry of Shipping, located in Bermuda, requires that corporate vessel owners be incorporated in the United Kingdom or its territories, and that individual be British, Irish, European Union or NATO-member state nationals. *See http://www.guidetoshipregistries. com/Private/Flags/Bermuda/Bermuda%20Shipowner%20Eligibility.htm* (last visited Nov. 29, 2004). The master of the vessel must meet the same citizenship requirement as an individual owner, but there is no other nationality-based crewing requirement. *See http://www.guidetoshipregistries.com/Private/Flags/Bermuda/*

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4. American Bureau of Shipping; Bureau Veritas; China Classification Society; Det NorskeVeritas;Germanischer Lloyd; Korean Register of Shipping; Lloyd's Register; Nippon Kaiji Kyokai; Registro Italiano Navale; and Russian Maritime Register. http://www.liscr.com (last visited Nov. 19, 2004).

5. American Bureau of Shipping; Bureau Veritas; Det Norske Veritas; Germanischer Lloyd; Korean Regisry of Shipping; Lloyd's Register; Nippon Kaiji Kyokai; and Registro Italiano Navale. The Official Guide to Ship Registries at 25.

Bermuda%20Crewing.htm(last visited Nov. 30, 2004). Bermuda does not impose corporate, income, capital gains, or any withholding tax. *See* http://www.guidetoshipregistries.com/Private/Flags/Bermuda/Bermuda%20Taxation.htm (last visited Nov. 30, 2004). Most attractive to owners of smaller or older vessels, Bermuda does not impose any size or age restrictions on vessels in its registry. *See* http://www.guidetoshipregistries.com/Private/Flags/Bermuda/Bermuda%20Vessel%20Eligibility%20&%20Survey%20Requirements.htm (last visited Nov. 30, 2004). Bermuda authorizes six classification societies to inspect its vessels.[6]

The Panama Maritime Authority, whose offices are in New York City, The Official Guide to Ship Registries at 319, imposes no nationality requirements for the ownership, *id.* at 317, or crewing, *id. at* 321, of its vessels. Panama imposes no income or withholding tax for non-resident shipping companies when the income is derived from activity outside Panama. *Id.* at 317. Panama will allow registration of any size or age vessel, but vessels older than 20 years are subject to special inspection. *Id.* at 321. Panama authorized 24 classification societies[7] to inspect its vessels. *Id.* at 321

6. American Bureau of Shipping; Bureau Veritas; Det Norske Veritas; Germanischer Lloyd's Register; and Registro Italiano Navale. *See* http://www.guidetoshipregistries.com/Private/Flags/Bermuda/Bermuda%20Vessel%20Eligibility%20&%20Survey%20Requirements.htm.

7. American Bureau of Shipping; Bureau Veritas; China Classification Society; China Corporation Register of Shipping; Det Norske Veritas; Germanischer Lloyd; Hellenic Register of Shipping; Honduras International Naval Surveying and Inspection Bureau; Isthmus Bureau of Shipping; Korean Register of Shipping; Lloyd's Register; National Shipping Adjusters; Nippon Kaiji Kyokai; Panama Bureau of Shipping; Panama Marine Survey and Certification Services; Panama Maritime Documentation Services; Panama Maritime Survey Bureau; Panama Register Corporation; Registro Italiano Navale; Registro Internacional Naval, S.A.; and the Russian Maritime Register. *See* The Official Guide to Ship Registries at 321.

2. The Role of Classification Societies—The Privatization of Sovereign Authority.

Because nations offering flags of convenience generally do not have the resources to police their own merchant marines, they typically rely on classification societies to inspect vessels on their behalf. While there is nothing necessarily wrong with the inspection performed by the classification societies, and they perform a vital function in the maritime industry by facilitating the issuance of various forms of marine insurance, classification societies are private commercial entities that compete for business. By delegating their inspection function to classification societies, open registries allow vessel owners to shop not only among flagging nations, but also, and primarily, among private inspecting entities. While there may be much to be said about fostering a free market in vessel inspections and insurance, that vessel owners may choose to take advantage of one market player, by choosing to register with a particular flag and choose a particular classification society, does not indicate deep sovereign interest on the part of the registering nation.

Classification societies have their origins in the world of marine insurance. Issuers of hull insurance, that is insurance payable to a vessel owner in case of damage to or loss of a vessel, need a means of evaluating the seaworthiness of a vessel for a particular purpose. For instance, a vessel meant to carry bulk cargo in the North Atlantic will have very different structural requirements than a vessel intended to carry passengers in the Gulf of Mexico.

Classification societies set out, and inspect for, various requirements for different types, or classes of vessels. Before deciding whether to issue insurance, and at what rates, a hull insurer will look to make sure that a vessel has met its class requirements. *See* Leslie J. Buglass, Marine Insurance and General Average in the United States, 30-31 (1981). Similarly, issuers of protection and indemnity, so-called "P&I," insurance, which covers a vessel owner's liability to third parties, will require a vessel to be in class. *See* Machael A. Miller, *Liability*

of Calssification Societies from the Perspective of Untied States Law, 22 Mar. Law. 75, 84 (1997) (hereinafter "Miller"). Also, while underwriters of cargo insurance will usually not require proof of classification of a carrier's vessel, underwriters will remove coverage on learning that a vessel carrying the cargo has lost coverage and shippers will check for classification. *Id.* at 85.

For vessels flying flags of convenience, classification societies also have a quasi-public function. They inspect for compliance with a variety of international conventions, most importantly the International Convention for the Safety of Life at Sea, 1974 (with 1978 and 1988 Protocols), 14 I.L.M. 959 ("SOLAS"), and the International Convention on Load Lines, April 5, 1966, 18 U.S.T. 1857, (with 1988 Protocol), and issue certificates under The International Convention on Tonnage Measurement of Ships, June 23, 1969, TIAS 10490, 34 U.S.T. 2363, which shows the weight of the vessel as measured under international standards. *See Sundance Cruise Corp. v. American Bureau of Shipping,* 7 F.3d 1077, 1078 (2d Cir. 1993) (describing an agreement between a vessel owner and classification society for inspection of a vessel registered in the Bahamas).

Because vessel owners pay for classification societies to inspect them, and there are different societies, societies are under economic pressure to classify vessels without causing a vessel owner to incur great costs. As one marine economist has put it:

> Classification societies have no legal authority. Consequently, they compete with each other for shipowner clients, thereby raising doubts about their safety enforcement performance—given the insoluble conflict of interest between themselves and shipowners that arises when hired by shipowners to class their ships. If a society requires a shipowner to incur expenses to class his ships, the shipowner's profits will decline, all else held constant. In a competitive environment for shipowner clients, and when shipowners themselves are facing stiff

> competition, societies are under pressure to reduce their safety demands, possibly classing non-seaworthy ships.

Wayne K. Talley, *Regulatory Issues: The Role of International Maritime Institutions,* available at http://www.oduport.org/REGULATORYISSUES.htm (last visited Nov. 28, 2004).[8]

Whether or not private classification societies provide generally effective regulation, their use by open registries for compliance with national requirements allows vessel owners to shop twice, once for the registry with the most favorable terms, and again among classification societies approved by the registry.

C. Flags of Convenience and the Cruise Ship Industry

Because the cruise ship industry provides what are, in many instances, domestic vacation services and because the cruise ship industry relies heavily upon flags of convenience, to allow foreign registry of a vessel *automatically* to defeat the application of Title III of the ADA to cruise ships in domestic waters would, allow a large part of the leisure industry, essentially under regulation by no sovereign, to avoid United States policy by a simple commercial choice—where to flag a cruise ship. For

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8. To be sure, the economic pressures on classification societies are not one-sided. If insurers and shippers cannot trust a classification they will not insure or ship with vessel classed by untrustworthy societies. Ten classification societies, as members, and two others as associate members now form International Association of Classification Societies ("IACS'), to for prescribe minimum standards for members. These standards are designed to prevent "classification society shopping." Miller, 22 Mar. Law.at 77. The members of the IACS are American Bureau of Shipping, Bureau Veritas, China Classification Society, Det Norske Veritas, Germanisher Lloyd, Korean Register of Shipping, Lloyd's Register, Nippon Kaiji Kyokai, Registro Italiano Navale, and the Russian Maritime Register. The associate members are the Croatian Register of Shipping and the Indian Register of Shipping. *See* http://iacs.org.uk/members.htm (last visited Nov. 29, 2004). There are, however, over 50 classification societies.

most nations offering flags of convenience all extent of control is checking that a vessel owner has paid its fees and that certificates have been issued by a private organization hired by the vessel owner. And this is the extent of sovereign control under which most cruise ships operate.

As their name implies, many United States cruise voyages depart and return from the same port. Many others, notably the cruises of the Alaskan coast spend most of their time in United States waters. The Passenger Services Act of 1886, 46 U.S.C. app. § 289 (2000), prohibits foreign-flagged vessels from transporting passengers between United States ports. These so-called cabotage regulations were designed to protect the United States merchant marine. Whatever their benefits to the domestic passenger ferry industry, the cabotage rules have little impact on the cruise industry. They do not prevent foreign-flagged vessels going from a United States port and back. Similarly the cabotage rules do not prevent a vessel owner from taking passenger on a cruise from a United States port and returning them by air, or from flying passengers to foreign ports and then taking them on a cruise to a United States port. *See* Kay Showker & Bob Schlinger, The Unofficial Guide to Cruises 1999, at 9 (1999) (stating that "the spectacular growth in cruise vacations really took off . . . when cruise lines discovered the benefits of joining forces with airlines.") Even in Alaskan cruises, where the ship will ply the coastal waters of Alaska allowing passengers to see and visit that State's spectacular coast line, owners are able to avoid United States cabotage laws by bussing their passengers from Seattle to Vancouver, British Columbia, to board their vessels. *See* 10 Benedict on Admiralty § 2.02 at 2-2 (7th rev. ed. 2003). As a result there is no effective requirement that cruise ships serving the United States market be registered in this country.

Thus, nearly "all of the major cruise lines operating in the North American market from ports in the U.S. register their ships with 'flags of convenience.'" Stephen Thomas, Jr., *State Regulation of Cruise Ship Pollution: Alaska's Commercial*

Passenger Vessel Compliance Program as a Model for Florida, 13 J. Transnat'l L. & Pol'y 533 , 540 (2004). Starting this year, Norwegian Cruise Lines has had one, and, in 2005, plans to have another, United States-registered vessel; however, the vessels are for the coastwise market in Hawaii, and Norwegian Cruise Lines still runs foreign-flagged vessels out of Hawaii to Fanning Island, in the Republic of Kiribati. *See* http://www.ncl.com/ destinations/hawaii/ index.htm (last visited Nov. 29, 2004).

To hold that a foreign flag, *per se*, exempts a vessel owner from compliance with Title III would exempt the cruise ship industry, a large part of the United States leisure market, from compliance with the statute. And in most, if not all cases, no great competing interest of a foreign sovereign would be served by this exemption. For example, in the case of a Alaskan tour operator bussing United States passengers from Seattle to Vancouver for a cruise in United States waters off the coast of Alaska in a vessel registered in Liberia, the Seattle hotel in which the passengers might stay for a day would have to comply with Title III, as would the bus carrying passengers for a few hours; however under the Fifth Circuit's holding the vessel in which United States passengers might spend two weeks in United States waters would be exempt. To hold that Liberia has a greater interest in the non-application of Title III a United States Passenger to a vessel operated in United States waters than the United States has in its application simply because the vessel is registered in Liberia's offices in the United States and is inspected by a private organization approved of by Liberia makes no sense.

Similarly, no classification society has anything to say about disability access, so classification is not contrary to any requirements imposed by Title III, and nothing inTitle III is directly contrary either to SOLAS or to the requirements of classification. To be sure, some international safety requirements might mean that a cruise ship might not be made as accessible to persons with certain disabilities as are similar land based

structures, like hotels. For example, because a vessel needs to have a water tight and compartmentalized (that is, requiring raised thresholds in the doorways) bulkhead deck to restrict flooding in a vessel, an entire vessel might not able to be made accessible to persons confined to wheelchairs. Indeed, the recent proposed Title III regulations for passenger vessels take into account the requirements of a watertight bulkhead deck. *See* Draft Passenger Vessel Accessibility Guideline and Supplementary Information, V206.2, Exception 4, available at http://www.access-board.gov/pvaac/ guideline.htm (last visited Nov. 29, 2004). That does not mean, however, that a vessel's upper decks cannot, and should not be make as accessible as possible.[9]

This is not to say that a foreign flag, even a flag of convenience, should be ignored in considering the application of Title III or other United States law. Rather, the interest of the sovereigns with a stake in the outcome of the case should be intelligently balanced. Happily, for maritime cases, this Court has developed a methodology for choice of law that takes into account not just the flag of a vessel, but also the other various interest involved in an action where a plaintiff seeks to apply United States law to the owners of a foreign vessel. It is this methodology that should apply to the applicability of the Title III to foreign flagged vessels in United States waters.

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9. Of course, were Title III to render either SOLAS compliance or classification impossible none of the many passenger and car ferries that ply United States waters and are registered in the United States would be able to pass inspection or to obtain insurance.

II.

BECAUSE THE DISCRIMINATION ALLEGED BY MR. SPECTER COMES WITHIN THE ADMIRALTY JURISDICTION OF THE FEDERAL COURTS WELL-ESTABLISHED ADMIRALTY OF CHOICE-OF-LAW PRINCIPLES APPLY TO HIS CLAIM.

Mr. Spector's claim of discrimination arises out of a maritime contract, contract of passage. Also, the treatment Norwegian Cruise Lines gave to Mr. Specter occurred on the navigable waters of the United States, arises out of a traditional maritime activity—the carriage of passengers, and poses a threat to maritime commerce by inhibiting the ability of disabled passengers to take advantage of cruise ship services. Thus, it constitutes a maritime tort. From the very beginning of this country's judiciary the federal courts have had jurisdiction over maritime torts and contracts. The general maritime law of the United States has a variety of doctrines that protect the life and safety of seamen and passengers at sea. These doctrines, which include the warranty of seaworthiness to seamen, as well as negligence and products liability for all at sea, impose requirements for vessel safety—including construction, equipping and crewing—to all to whom they apply. Nonetheless, this court has concluded that these doctrines may apply to foreign flagged vessels, and has established a methodology for deciding when federal maritime law applies to claims arising under the federal admiralty jurisdiction. Because shipboard claims of disability-based discrimination against a passenger fall within the admiralty jurisdiction, this Court's this methodology for admiralty choice of law should apply.

A. Mr. Spector's Claim is Within the Admiralty and Maritime Jurisdiction of the District Courts.

Article III of the Constitution extends the judicial power of the United States to, among other matters, "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2, cl. 1. The First Congress gave the District Courts "exclusive jurisdiction

in all civil cases of admiralty and maritime jurisdiction, saving to suitors all remedies to which they are entitled at common law." An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). That grant now exists in 28 U.S.C. § 1333(1) (2000), which extends the jurisdiction of the District Courts to any "civil case of admiralty and maritime jurisdiction saving to suitors all other remedies to which they are otherwise entitled." When a case falls within the admiralty jurisdiction, whether or not it is brought pursuant to that jurisdiction in federal court, and even if it is brought in state court, maritime choice of law principles will apply. *See Keremec v. Compagnie Transatlantique* 358 U.S. 625, 628-29 (1959), *see also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411 (1953) ("[S]ubstantial rights . . . are not to be determined differently whether [a] case is labelled 'law side' or 'admiralty side' on a district court's docket"), *quoted in Norfolk Southern Ry. Co. v. Kirby,* 125 S. Ct. 385, 392 (2004).

The admiralty jurisdiction extends to all contracts that are of a maritime nature, *Kirby,* 125 S. Ct. at. 393 (citing cases), and, as this Court held in *The Moses Taylor*, 71 U.S. 411 (1866), a contract of carriage of a passenger is subject to the admiralty jurisdiction of the federal court. *Id.* at 427. Accordingly, the contract between Mr. Specter and Norwegian Cruise Lines was a maritime contract.

In tort the grant of admiralty jurisdiction in 28 U.S.C. § 1333(1) extends to those torts occurring on the high seas and on the navigable waters of the United States and, at least where the tort occurs on the navigable waters of the United States, this Court has required that there be a connection with traditional maritime activity such that the tort have a significant connection with traditional maritime activity and there be a threat of disruption to maritime commerce. *See Sission v. Ruby,* 497 U.S. 358, 363-65 (1990); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 534 (1995). While not all cases that occur on a vessel in navigable waters will come within the admiralty jurisdiction this court has explained that they

usually will. *See Grubart* 513 U.S. at 541-42. In this case there can be no doubt that the discrimination suffered by Mr. Specter comes within the admiralty jurisdiction. The carriage of passengers is a traditional maritime activity, and, as one District Court has noted, "opulent cruise ships have been part of the world's maritime tradition at least since the launching of Cleopatra's barge." *Friedman v. Cunard Line Ltd.,* 996 F. Supp. 303, 307(S.D.N.Y. 1998). Moreover, discrimination against and mistreatment of passengers of a particular class threatens to disrupt that class's ability to take part in the maritime commerce.

Indeed, claims of discrimination against passengers have long been recognized as part of the law of admiralty. In *Chamberlin v. Chandler,* 5 F.Cas. 412 (C.C.D. Mass. 1823) (No. 2,575) the court considered the case of a woman who had booked passage on a vessel from Hawaii to Boston and who was subjected to treatment that caused her to confine herself to her cabin. In the course of awarding punitive damages for the defendant's tortuous conduct, Justice Story, sitting on circuit, explained the nature of a contract of passage as being:

> not for mere ship room, and personal existence, on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor, which constitutes the charm of social life, for that attention, which mitigates evils without reluctance, and that promptitude, which administers aid to distress.

Id. at 414. *Accord, Kornberg v. Carnival Cruise Lines,* 741 F.2d 1332, 1334 (11th Cir. 1984); *Chicago, D. & G.B. Transit Co. v. Moore,* 259 F. 490 (6th Cir.), *cert. denied*, 251 U.S. 553 (1919); *The Oregon,* 133 F. 609, 617-18 (9th Cir.1904); *Defrier v. The Nicaragua*, 81 F. 745 (S.D. Ala. 1897). Thus, without reference to the ADA the general maritime law gives relief to disabled passengers where a vessel owner knew or should have known of the passenger's disability and failed reasonably to accommodate that disability. *See Alpert v. Zim Lines,* 370 F.2d

115, 116 (3d Cir. 1966); *American President Lines, v. Lundstrom,* 323 F.2d 817, 818 (9th Cir. 1963).

Because this case arises out of a maritime contract and involves a tort on the navigable waters which bears a significant relation to traditional maritime activity and has a potential to disrupt maritime commerce it falls within the admiralty jurisdiction of the federal courts. Therefore, the choice of law principles articulated by this Court for admiralty cases should apply.

B. Admiralty Choice of Law Principles Involve a Consideration of a Variety of Factors in Addition to The Flag of the Vessel and Applies to Laws the Have the Potential to Affect the Structure of A Vessel, As Opposed to Labor-Management Relations.

1. Admiralty Choice of Law Principles Involve More than Consideration of the Flag of a Vessel.

In a series of three cases this Court has articulated the principles for choice of law in cases subject to the admiralty jurisdiction of the district courts. In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court considered whether the of the Jones Act, 46 U.S.C. app. § 688 (2000), which by its terms authorizes "any seaman" to bring an action against a "defendant employer" for negligence, applies to an injury to an alien seaman on a foreign-flagged vessel. The court set out seven factors to be considered: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the ship owner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. *Id.* at 583-91.[10]

10. The *Lauritzen* Court distinguished that case from one where an injured United States citizen would seek relief, noting that "each nation has a legitimate interest that its nationals and permanent (Cont'd)

Subsequently, in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court decided that not only claims under the Jones Act, but also those arising under the general maritime law should be subject to the *Lauritzen* choice of law analysis. *Id.* at 381.

Finally, in *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970) this Court cautioned that the factors listed in *Lauritzen* were meant neither to be applied mechanically nor to be exclusive. *Id.* at 309. Rather, the court concluded that the ships base of operations, along with other possible factors, was another factor to be considered. *Id.* at 308-09.

Accordingly, under the *Lauritzen-Romero-Rhoditis* trilogy there are at least eight factors to be considered in determining whether foreign or domestic law will apply in an action within the admiralty jurisdiction. The flag of the vessel involved is only one. Thus in *Rhoditis* the Court concluded that United States law should apply to an action by a seaman of Greek nationality who had signed an employment agreement in Greece for work aboard a Greek owned and flagged vessel, and who was injured on that vessel, where the injury took place in United States waters, the vessel owner was a resident alien of the United States, and had his base of operations in New York, and the owners vessels had their major source of income from shipping to and from the United States. Accordingly, after *Rhoditis* lower courts have applied the general maritime law of the United States to foreign seamen on foreign vessels. *See, e.g., Karvelis v. Constellation Lines S.A.*, 806 F.2d 49, 50-51 (2d Cir. 1986), *cert. denied sub nom., Constellation Lines, S. A. v. Karvelis,* 481 U.S. 1015 (1987). Indeed even though the *Lauritzen* Court

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inhabitants be not maimed or disabled from self-support." 345 U.S. at 586. As the authors of a leading work on maritime law have explained, "the fair implication of [the language in *Lauritzen*] is that American law applies to Ameican citizens . . . whether they serve on American-flag or foreign flag ships. . . ." Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 476 (2d ed. 1975).

stated that the law of the flag-state "must prevail unless some heavy counterweight appears," 345 U.S. at 586, the *Lauritzen* Court itself, *see* 345 U.S. at 587, and various lower courts have made "equally clear that the law of a flag of convenience state is not entitled to the same conclusive effect as that of a 'legitimate' flag state and cannot be used to oust otherwise applicable law." *Pandazopoulos v. Universal Cruise Line, Inc.*, 365 F. Supp. 208, 214 (S.D.N.Y. 1973) (citations omitted).

While the proper application of the *Lauritzen-Romero-Rhoditis* factors depends on a case by case analysis—the injury to an a United States citizen aboard a round-the-world bound vessel based in a foreign country and simply stopping to pick up passengers in a United States port, might result in a different conclusion from that where a United States Citizen is injured on board a United States-based vessel that departs and returns to a port in this country—exclusive reliance on vessel's flag, without any consideration of the nature of that flag or the other factors outlined in *Lauritzen* and *Rhoditis* is contrary to the proper analysis this Court has established for maritime cases.

2. The *Lauritzen-Romero-Rhoditis* Choice of Law Analysis is Applicable to Claims Relating to Ship Management and Construction.

The Fifth Circuit below relied on this Court's decisions in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) to conclude that Title III of the ADA could not apply to foreign flag vessels because there was no express intent by Congress to apply the ADA extraterritorially. *See Spector v. Norwegian Cruise Line, Ltd.*, 356 F.3d 641, 644-45 (5th Cir. 2004). According to the Fifth Circuit, the structural changes mandated by Title III would have a permanent, extra-territorial effect on the structure of a foreign-flagged vessel, which would impinge on the sovereignty of the flagging nation. *Id.* at 648. As explained above, that argument has no foundation. Moreover, it proves too much; for, if no law having an impact on the structure on vessel were applicable to foreign flagged

vessels, then neither the Jones Act, nor large portions of the general maritime law would be applicable to foreign flagged vessels.

As this Court held in *Lauritzen*, the question of whether the Jones Act is applicable aboard foreign flagged vessels involves a balancing test, and whether the general maritime law of the United States applies to claims involving foreign flagged vessels should be analyzed under the standards set out in *Lauritzen*. *See Romero* 358 U.S. at 381. Both the Jones Act and the general maritime law of the United States provide ample basis for imposing on vessel owners and operators changes in the structure and management of their vessels to insure the safety of passengers and crew.

As explained above, the Jones Act, provides "any seamen" with an action for negligence against the seaman's employer. While a Jones Act action may be based on violation of a statutory duty, *see Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958), it may also be based on breach of a non-statutory duty of care, such as the requirement to furnish a seaman with proper equipment to perform a task the employer could have anticipated. *See, e.g., Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 522-23 (1957) (concluding that failure to furnish a shipboard baker with an implement safely to serve hard-frozen ice cream may result in Jones Act liability).

In addition to the Jones Act, the general maritime law provid[illegible]eamen with an action for seaworthiness. The doctrine of seaworthiness imposes on a vessel owner the non-delegable duty of providing to seamen a vessel that is fit for its intended voyage. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548-49 (1960); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100-101 (1944). As a form of strict liability, seaworthiness had, by the middle of the twentieth century, become the primary vehicle for recovery by injured seamen. *Moragne v. States Marine Line, Inc.*, 398 U.S. 375, 399 (1970). The warranty of seaworthiness applies to the hull of a ship, the ship's cargo-handling machinery,

hand tools aboard the ship, ropes and tackle and to all other equipment either belonging to the ship or brought aboard by stevedores. *See Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co,* 376 U.S. 315, 322-23 (1964); *Michalic v. Cleveland Tankers, Inc.* 364 U.S. 325, 328 (1960); *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423, 427 (1959). Moreover, the crew itself is warranted as seaworthy. *See Waldron v. Moore-McCormick Lines*, 386 U.S. 724, 726 (1967); *Boudin v. Lykes Brothers Steamship Co.*, 348 U.S. 336, 339-40 (1955).

While there has been general agreement that the warranty of seaworthiness does not extend to passengers, *see Kermarec,* 358 U.S. at 628, passengers are owed a duty of reasonable care. *Id.* at 630. Fulfilling that duty may require that a vessel owner to make modifications to the structure of vessel where the owner knows, or has reason to know that the vessel is unsafe. *See Harnesk v. Carnival Cruise Lines,* 1992 A.M.C. 1857 (S.D. Fla. 1991) (holding a vessel owner liable for a negligently constructed bathroom); *Beretta v. Home Lines, Inc.,* 1990 A.M.C. 1857 (S.D.N.Y. 1990) (same); *Keefe v. Bahama Cruise Lines, Inc.*, 715 F. Supp. 1069 (M.D. Fla. 1989) (holding vessel owner liable for injury caused by a slippery, uncovered outdoor dance floor), *aff'd* 902 F.2d 959 (11th Cir. 1990); *Oispuk v. Oceanic Steam Navigation Co.,* 58 F.2d 673 (S.D.N.Y. 1932) (holding vessel owner liable for negligently failing to provide an outside door with a vestibule or to furnish a control to slow down the door's closing).

Finally, the general maritime law recognizes the doctrine of products liability. *See East River S.S. Corp. v. Transamerica Deleval, Inc.,* 476 U.S. 858, 873-74 (1986). The ability to hold a manufacturer or vendor strictly liable for the products it puts into commerce doctrine may not impose liability directly on a vessel owner. However, the ability of passengers to bring an action for unreasonably dangerous product aboard a vessel will have an effect on the construction of the vessel and the fittings with which it is equipped. *Cf. Silivanch v. Celebrity Cruises, Inc.,* 171 F. Supp. 2d 241 (S.D.N.Y. 2001) (entering judgment

on passengers' claims of strict products liability and negligence against filter manufacturer and negligence against vessel owner for a whirlpool spa that caused a shipboard outbreak of legionnaire's disease), *app. dismissed* 333 F.3d 355 (2d Cir. 2003), *cert. denied sub. nom., Essef Corp. v. Silivanch,* 124 S. Ct. 1047 (2004).

Accordingly, both the Jones Act and the general maritime law have potential to require permanent alteration in a ship's structure and equipment. For example, the law of seaworthiness may require a vessel owner to change the way it maintains equipment on board, *see Crumady,* 328 U.S. 427-28, or to alter the type of tools it makes available to the crew of the vessel. *See Michalic,* 364 U.S at 328-29. These duties do not differ in their level of internal interference with a vessel's operations from those imposed by Title III, and there is no reason why passengers complaining of the safety of a bathroom or a whirlpool spa should be able to take advantage of United States law, but those denied access to same facilities should be, *per se,* barred from that law's protection.

Because the Fifth Circuit's holding prohibits application of domestic law that could require the alteration of the structure of a vessel, the Jones Act, the doctrine of seaworthiness, and the United States maritime law of negligence and products liability could never be applicable to foreign flagged vessels, and that is clearly contrary to the point of the *Lauritzen-Romero-Rhoditis* trilogy, which is to decide whether or not claims under the Jones Act and the General Maritime Law of the United States should apply to foreign flagged vessels.[11]

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11. If *Romero's* understanding of choice of law and the Fifth Circuit's holding are both to survive, it would result in the odd situation of the general maritime law regarding vessel safety and conditions, which has been fashioned by the judiciary, being applicable to foreign flagged vessels, but, absent some specific declaration of Congress, Congressional enactments would never applicable. Indeed, given this Court's deference to Congressional action in the area of maritime law, *see Norfolk*

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A much better reading of *Benz* and *McCulloch* in conjunction with *Romero* would be to hold that the "internal affairs" of a vessel constitutes labor-management relations, and that absent some specific statement from Congress, laws relating to labor relations would not have any applicability to foreign flagged vessels; however, where a statute concerns areas presently addressed by the general maritime law, including the treatment of passengers, it should be treated under the usual maritime choice of law analysis. The Court's opinion in *McCulloch* and subsequent case law demonstrate that this is the correct reading.

The *McCulloch* Court considered the use of the balancing test proposed by the National Labor Relations Board (the "NLRB") to see whether it had jurisdiction over an attempt to organize by foreign seamen working on a foreign vessel. 372 U.S. at 15. The court held that the foreign flag of the vessel *per se* excluded the NLRB's jurisdiction over the effort by the foreign seamen to organize. The court emphasized that a balancing test would not be appropriate in dealing with the "internal discipline and order" of a foreign vessel, *id.* at 19, and concluded that there it would not infer the authority to interfere with the "management and internal affairs" of a foreign vessel. *Id.* at 20. In the context of the case the only reasonable reading of "management and internal affairs" is labor-management relations, not the sort of vessel conditions covered by doctrines of negligence, under the Jones Act, and seaworthiness and regulated by Title III. Thus the Court acknowledged that its

> conclusion does not foreclose such a procedure in different contexts, such as the Jones Act, 46 U.S.C. § 688, where the pervasive regulation of the internal order of a ship may not be present.

(Cont'd)

Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21 (1990), such a position would make no sense.

372 U.S. at 19 n.9. The Court defined "management and internal affairs" of a vessel by associating it with "internal order" in opposition to the physical conditions regulated by the Jones Act.

To be sure the Court went on to note that for the Jones Act the *Lauritzen* Court had emphasized the "cardinal importance of the law of the flag." *Id.* (citing *Lauritzen*). Nonetheless, only four years *after McCulloch,* in *Rhoditis,* this Court expanded the reach of the Jones Act by adding the base of operations as another, and in that case determinative factor, to its choice of law balancing test. *Rhoditis* demonstrates that *McCulloch* did not change this Court's understanding set out in *Lauritzen* and *Romero* that claims under for negligence under the Jones Act and unseaworthiness under the general maritime law, both of which could effect the structure of a vessel, could be brought for claim arising on a vessel with a foreign flag.

In this case Title III, like the Jones Act and the law of seaworthiness negligence and products liability speaks, only to the physical conditions on a vessel—in Title III's case for passengers—not to the master, owner, or employer's managerial relations with the crew, and should be subject to a similar choice of law test. Moreover, Congress can be assumed to have been aware of the applicability of the *Lauritzen-Romero-Rhoditis* test at the time it enacted Title III.

C. Congress Was Aware of the *Lauritzen-Romero-Rhoditis* Test When It Enacted Title III.

This Court has explained that it will assume that Congress is familiar with the law when it enacts legislation, no less in maritime cases than in any other. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In this case, an assumption that Congress was aware of this Court's maritime choice of law jurisprudence at the time of Title III's enactment would be especially valid; for, prior to the enactment of Title III Congress had legislated in response to the application of that jurisprudence in the lower courts.

In 1982 Congress amended the Jones Act to add what is now 46 U.S.C. app. § 688(b), which excludes from the act's coverage aliens working in energy and mineral exploration in the waters, or above the continental shelf of foreign countries. *See* Act of Dec. 29, 1982, P.L. 97-389, Title V, § 503(a), 96 Stat. 1955. The 1982 amendments were enacted along with the rest of a House Bill, the Fisheries Amendments of 1982, H.R. 3942, 97th Cong., 2d Sess. (1982). The Jones Act amendments provision of that bill, section 503, was adopted from H.R. 4863, 97th Cong., 2d Sess. (1982). *See* 128 Cong. Rec.H. 7,631 (daily ed. Sept. 28, 1982). The committee report on H.R. 4863, H.R.Rep. No. 97-863, 97th Cong., 2d Sess., 1982, explained the purpose of the amendment:

> The courts have generally found that the substantive rights granted by the Jones Act do not extend to foreign nationals who lack sufficient contacts with the United States. These court decisions are not a denial of equal access but rather a determination of lack of standing. The decisions generally hold that the litigant has no right which can be enforced in a U.S. court. H.R. 4863 codifies this case law and clarifies that the substantive rights granted by the Jones Act do not extend to foreign offshore workers.
>
> The legislation is in accord with customary international law and international agreements in that it recognizes the rights of a nation to regulate activity within its territorial waters and in the Outer Continental Shelf adjacent to the coast of that nation. The present situation whereby domestic United States law is applied to actions and occurrences within the jurisdiction of a sovereign foreign nation is an unwarranted application and extraterritorial extension of U.S. law and not in accord with our treaties of friendship and navigation.

Id. at 7. Congress was, in fact, aware of the efforts by foreign seamen to extend the Jones Act, along with the general maritime

law of the United States, to foreign seamen in foreign waters. While Congress did not approve of such an extension, and codified its rejection by the lower courts, it did nothing to change the avoid the result in *Rhoditis,* which concluded that a foreign plaintiff injured on a foreign vessel in United States waters could recover under the Jones Act. *A fortiori,* it would appear that Congress approved of recovery by a United States plaintiff injured aboard a foreign vessel in United States waters.

Congress' understanding of the Jones Act should be read as background to the passage of Title III; for, as noted above, Title III, like the Jones Act does not interfere with labor management relations aboard a ship. Indeed, because it does not apply to employees Title III is less intrusive on a vessel's "management and internal affairs" than the Jones Act. The foreign status of a vessel should not, *per se,* preclude recovery under Title III; rather the applicability of Title III should be determined by the familiar *Laruitzen-Romero-Larsen* test.

CONCLUSION

For all the forgoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL COUNCIL OF CRUISE LINES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The International Council of Cruise Lines ("ICCL") is the leading nonprofit trade association representing the interests of its 16 member lines and more than 95 associate member companies in a diverse array of domestic and international forums. ICCL's members include the largest passenger cruise lines trading in ports worldwide. Among its associate members are industry suppliers and strategic business partners. Each year ICCL's cruise ships carry over ten million passengers on more than 115 ships, the largest of which carry more than thirty-five hundred guests per voyage.

In addition to U.S. citizens, ICCL vessels embark many foreign citizens, both in the U.S. and abroad. Of the more than 100 foreign ships visiting U.S. ports annually, some routinely embark or disembark their passengers. Others do so occasionally or only rarely. Some members' vessels embark and disembark passengers abroad but enter U.S. waters only for port visits. The members' ships vary in size, age,[2] nation of construction and registry.[3] All but two are designed, built, classed, certified and flagged abroad. All are subject to a stringent and complex array of international shipbuilding and operational laws.

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[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation or submission.

[2] Unlike shore side hotels and other buildings, the average life span of an oceangoing ship is approximately 35 years. The average life of ICCL members' ships is considerably less.

[3] Respondent's ship at issue in this case is registered in the Bahamas. More than 75 ICCL ships are registered in the Bahamas, and some 85 in U.K. Commonwealth countries.

ICCL member lines have diligently provided access for guests with disabilities. Despite the unique challenges inherent in the shipboard environment, all ICCL lines, including Respondent, endeavor to accommodate wheelchairs, electric mobility devices, service animals, auxiliary aids and other special needs. All ICCL members, including Respondent, have modified practices and procedures in an effort to provide full access. However, numerous technical issues are associated with reconciling the need for accessibility on cruise ships with foreign and international safety, shipbuilding and accessibility laws. Title III injunctive actions have nonetheless been brought against most foreign cruise ships, leaving ICCL's members and the courts in a legal quagmire as a result of the statutory and regulatory void.

SUMMARY OF ARGUMENT

Unless Congress first determines whether and under what circumstances Title III applies, lawsuits seeking modifications aboard foreign ships are misguided. Congress, and not the courts, should determine how to resolve conflicts between U.S. accessibility standards and applicable foreign and international laws. Congress has already amended Title I of the ADA, governing employment of persons with disabilities, to cover extraterritorial application *and* conflicts with foreign law. Congress amended the Air Carrier Access Act to include foreign aircraft *and* limit the authority of the regulatory agencies to interfere with foreign laws. Foreign cruise lines deserve an equally deliberate legislative process.

The confusion over whether and to what extent the ADA applies to foreign ships has fomented litigation in many jurisdictions. Regardless of their good intentions, advocacy groups and individuals seek to impose their own accessibility standards on this international industry. Federal courts are

being asked to guess what Congress and the regulators intend to be the required level of accessibility when U.S. citizens travel on foreign ships, resulting in forum shopping and inconsistent rulings. This Court should not permit the removal of architectural barriers on foreign ships unless and until a statutory framework is created specifying the extent of Title III's application, and a clear mechanism is established for resolving conflicts with other laws. The DOJ and DOT must thereafter promulgate regulations that provide cruise lines with the opportunity to voluntarily comply with specific standards before being sued.

Nowhere has Congress stated or implied that Title III applies to foreign facilities that either visit the U.S. or are visited by Americans. The legislative history is devoid of any such discussion. Congress evidently never considered the potential for a foreign facility, such as a cruise ship, to relocate to the U.S. on a long-term or only occasional basis. Therefore, the legislature never addressed the reach of Title III at sea. Absent an expression of Congress's intent, ignoring the well-established presumption against extraterritorial application of U.S. laws in this situation is unprecedented and unworkable. A ship's design, operation and construction certainly involve its "internal affairs." Accordingly, the legal presumption requiring an expression of congressional intent is directly implicated. The adoption of an *ad hoc* common law choice of law analysis to determine if the ADA applies to each foreign ship, as urged by Petitioners and their *amici*, wrongly usurps Congress's authority to so specify. A case-by-case approach by the courts, in lieu of any direction from Congress, fosters even greater confusion over what standards apply.

Congress directed the DOT and DOJ to enact specific accessibility regulations for covered entities to give the Act meaning. The effective date of the ADA was delayed to allow time for voluntary compliance. Under the

Administrative Procedures Act ("APA"), adopting such regulations requires public notice and comment by interested parties. This process was duly completed for land-based facilities by the DOT and DOJ within the congressionally-prescribed deadline. Covered entities operating facilities on land knew the precise requirements so they could comply. In the cruise industry, no regulations addressing construction, alteration, barrier removal, or policies and procedures have been adopted for any ships, let alone those designed, built and flagged abroad. The majority of cruise ships calling in the U.S. are foreign, so the failure of the DOT or DOJ to enact regulations points to the agencies' own confusion over the extent of Title III's reach.

These federal agencies, with expertise to address access issues, have consistently stated their land based *ADA Accessibility Guidelines for Buildings and Facilities* ("ADAAG" regulations) do not apply at sea, due to the substantial differences between buildings and ships. In addition to the obvious physical features, oceangoing vessels must be self-sufficient in a marine casualty for the safety of *all* passengers. Ships do not have recourse to the emergency resources available to land based facilities. The vital distinctions dictate particular design, operation and safety considerations. Nonetheless, federal courts, ill-equipped for the task, are being asked to reconcile conflicting proposals of interested parties with international shipbuilding and safety mandates. The resulting dilemma is amplified by the continuous movement of cruise ships to foreign and domestic jurisdictions, the unique legal and physical environments in which they operate, and the Constitutional requirements of maritime uniformity and due process.

ARGUMENT

I. CONGRESS SHOULD DETERMINE WHETHER AND WHEN TITLE III APPLIES TO FOREIGN SHIPS OPERATING INTERNATIONALLY

Neither Title III nor its legislative history includes a single word applying the Act extraterritorially.[4] That Congress never envisioned applying Title III beyond facilities permanently located in the U.S. is corroborated by the lack of reference to conflicts with foreign laws. Nor is there mention of the impact of unilaterally extending U.S. accessibility standards to international maritime commerce. For courts to disregard these important considerations when foreign ships enter U.S. waters, especially with regard to physical features as Petitioners suggest, wrongly displaces the legislature's role.

Congress had no difficulty expressing its intention to extend portions of the ADA extraterritorially when it chose to do so. Title I of the same Act, governing employment, was amended in 1991 to include several provisions addressing extraterritorial application.[5] Congress limited the reach of Title I by specifying discrimination claims could not be brought for actions required by foreign law. (42 U.S.C. § 12112(c)(1)). These amendments evidence Congress's

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[4] Although the statute contains an exhaustive list of "public accommodations" and "specified public transportation," it does not mention ships, let alone foreign ships. 42 U.S.C § 12181(7), (10). *See also* House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336 (1990). In over 3000 pages of published legislative history no mention is made of cruise ships.

[5] The definition of "employee" includes U.S. citizens working abroad. (42 U.S.C. § 12111 (4)). Congress extended Title I to "covered entities in foreign countries" (42 U.S.C. § 12112(c)), and "control of [a foreign] corporation" by an American employer (*Id.*, subsection (2)). Title I prescribes criteria for determining whether an American employer controls a foreign corporation (*Id.*, subsection (2)(C)).

intent to apply Title I only to Americans working in foreign countries for companies controlled by Americans. Congress was also careful to recognize the obligations imposed on covered entities by foreign laws.

In the 2000 amendments to the Air Carrier Access Act ("ACAA"), prohibiting discrimination against disabled passengers traveling by air, Congress specifically included foreign aircraft. (49 U.S.C. § 41705(a)).[6] Lawmakers recognized the potential for conflicts with foreign laws and the need for uniform accessibility standards. Congress therefore required the DOT to "act consistently with obligations of the United States Government under an international agreement," "consider applicable laws and requirements of a foreign country," and "not limit compliance by an air carrier with obligations or liabilities imposed by the government of a foreign country . . ." 41 U.S.C. § 40105(b)(1)(a), (b), and (c).

These amendments to Title I and the ACAA demonstrate Congress knows how to apply U.S. law extraterritorially in situations strikingly similar to the present case. Title III demonstrates just as clearly the absence of any intent to apply the ADA to accommodations operated beyond the U.S., such as foreign cruise ships.[7] The DOJ long ago

[6] Congress further required the DOT to "work with appropriate international organizations and the aviation authorities of other nations to bring about the establishment of higher standards for accommodating handicapped passengers in air transportation, particularly with respect to foreign air carriers that code-share with air carriers." (106 P.L. 181, § 707(c), 114 Stat. 158, April 5, 2000).

[7] In response to this Court's holding in *EEOC v. Arabian American Oil Co. ("Aramco")*, 499 U.S. 244 (1991), that Title VII did not apply extraterritorially, Congress amended both Title VII and *only* Title I of the ADA, providing limited foreign application. Title III was not amended, even after the potential of international implication was brought to Congress's attention through the *Aramco* decision. *Aramco* noted: "Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." 499 U.S. at 258. *Aramco* listed various examples and concluded "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." 499 U.S. at 259.

conceded Title III does not have extraterritorial reach because of the lack of congressional expression for such application.[8]

Congress must determine whether Title III applies to foreign cruise ships at all, and if so, to every ship embarking, disembarking or entering the U.S., only those that do so with regularity, based upon the percentage of U.S. passengers carried, or according to other criteria. Most of the world's cruise ships reposition among multiple jurisdictions throughout each year, both in the U.S. and abroad. A typical ship might spend the winter months cruising the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer cruises embarking in Vancouver and stopping at ports in Alaska. Longstanding

[8] In its June 29, 1999 letter to U.S. Congresswoman Marge Roukema, the DOJ recognized:

> Title III of the ADA does not contain any express provisions extending the law to extraterritorial activities. Moreover, although Title III of the ADA applies to public accommodations and commercial facilities whose operations 'affect commerce' and the statute defines commerce, in part, as 'travel, trade, traffic, commerce, transportation or communication . . . between any foreign country or any territory or possession and any State,' such broad language, found in many laws, is not generally considered sufficient, by itself, to overcome the presumption against extraterritoriality. . . Furthermore, Congress, in passing the Civil Rights Act of 1991, amended sections 101(4) and 102 of the ADA, to broaden the ADA to protect extraterritorial employment. . . No comparable, explicit expression has been made with respect to extraterritorial coverage of public accommodations and commercial facilities under title III.

(Internal citations omitted), *available at* <http://www.usdoj.gov/crt/foia/tal792.htm>.

U.S. cabotage laws prohibit foreign vessels from engaging in coastwise trade, thus mandating travel to foreign ports. *See* Passenger Services Act, 46 U.S.C. § 289, and Jones Act, 46 U.S.C. § 883. Were every foreign nation to apply its own accessibility standards to international cruise ships embarking passengers in its territorial waters, as was done in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), *reh'g denied, reh'g en banc denied* 284 F.3d 1187 (11th Cir. 2002), it would result in a clear operational dilemma.[9]

Before imposing vague and undelineated ADA requirements on foreign cruise ships, Congress must also consider the existing international maritime regime. Among the most important of these laws are the IMO recommendations for vessel design and operation with regard to accessibility,[10] the technical, structural, safety and operational mandates of SOLAS,[11] and the International

[9] For illustration purposes, ICCL member cruise lines will embark passengers in all of the following foreign nations within the next year: Africa, Argentina, Aruba, Australia, Bahamas, Barbados, Brazil, Canada, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, England, France, Greece, Iceland, India, Italy, Japan, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Russia, Seychelles, South Africa, Spain, Sweden, Tahiti, Thailand, Turkey, United Arab Emirates, and Vietnam.

[10] The IMO is a United Nations agency that reviews current maritime issues and sets international law by adopting conventions and treaties among its 164 member nations, including the United States. The IMO and its member states comprise 98% of the world's shipping tonnage and is responsible for establishing global standards for cruise ship safety, design and construction. The IMO Maritime Safety Commission ("MSC") published its "Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs" on June 24, 1996. *See* IMO's MSC Circular 735.

[11] International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, *reprinted in* SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001).

Convention on Load Lines governing watertight integrity aboard oceangoing vessels.[12]

A. Foreign Cruise Ships Are Built and Operate Under a Pervasive System of International Laws

All foreign ships are built in foreign shipyards pursuant to worldwide shipbuilding standards, in compliance with several international treaties. The ships are inspected and certified by international bodies before commencing operation. Buildings in the U.S. are constructed according to domestic engineering standards that take into account longstanding ADAAG regulations for accessibility. U.S. building codes, including ASME, ANSI and BHMA,[13] were developed so entities covered by the ADA could comply with existing standards. These land based U.S. standards neither apply to cruise ships built abroad nor are readily transferable to a marine environment.[14] No vessel built in a U.S. shipyard

[12] Among the requirements of the Convention on Load Lines, also ratified by the United States, is the installation of watertight doors in specified compartments, necessitating raised sills and thresholds (International Convention on Load Lines, Apr. 5, 1966, Ch. II, Regulation 12, 18 U.S.T. 1857), which plaintiffs' counsel have argued violates the ADA.

[13] American Society of Mechanical Engineers (ASME); American National Standards Institute (ANSI); Builders Hardware Manufacturers Association (BHMA).

[14] The Passenger Vessel Access Advisory Committee ("PVAAC"), created by the U.S. Access Board to formulate recommendations for accessibility on large passenger ships, issued its final report in December 2000. Its recommendations were based on U.S. engineering standards and urged that the "competent regulatory drafting authorities . . . specifically review all referenced industry standards to determine their suitability in designing equipment for use onboard ships in the marine environment" and that final regulations recognize international standards used in foreign shipyards. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, *available at*

for international commerce would be constructed according to land based building codes of another nation.

Comprehensive treaties already govern ship design, construction and operation. Perhaps the most important, SOLAS, deals with safety at sea.[15] International treaties are instrumental in establishing consistent standards for all nations participating in maritime commerce, including the United States. Uniform application avoids conflicts among varying national standards that could frustrate commerce and heighten tensions in foreign relations.

Other important maritime compliance safeguards, used by all flag nations including the United States, are certificates issued by classification societies.[16] Uniformity among these societies is maintained by the International Association of Classification Societies, whose members are bound not only by a code of ethics but also a quality systems certification scheme. The U.S. Coast Guard depends upon the classification societies to ensure compliance with international standards for design, operation and construction of ships entering U.S. waters.

<http://www.access-board.gov/pvaac/commrept/index.htm>., Ch. 1, notes.

[15] SOLAS was adopted in 1914 in response to the Titanic disaster and has since been amended and adopted by signatory nations, including the United States, four additional times. The 1960 SOLAS amendment was the first major task tackled by the IMO. Over 40 conventions and protocols have been drafted and adopted by IMO members along with 800 codes and sets of recommendations that complement the treaties.

[16] Classification Societies are privately owned, operate separately from any nation's control and are generally non-profit organizations. They date back more than 200 years and determine the international regulations applicable to the construction and operation of commercial maritime vessels, including cruise ships, and certify, through periodic inspections, each vessel's design and construction. The United States, like other flag nations, inspects vessels for class certifications, and routinely relies upon the largest classification societies to certify U.S. and foreign flag vessels, including Lloyd's Register of Shipping, Nippon, Kaiji Kyokei, American Bureau of Shipping, Det Norske Veritas of Norway, and Bureau Veritas of France.

Congress must evaluate the impact of U.S. accessibility standards on this complex system of laws governing foreign ships. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138, 147 (1957). Further, a number of other nations have proposed or enacted their own laws establishing accessibility standards for transporting passengers with disabilities on vessels flagged in their countries.[17] The blanket imposition of domestic standards on international carriers destroys the concept of uniformity and defeats the goal of national administrations to develop consistent standards.[18] The legislature must first consider the implication of exercising

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[17] *See* United Kingdom's Disabled Persons Transport Advisory Committee's Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People ("DPTAC"), modeled after IMO's guidelines of MSC Circular 735, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada's Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http://www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia's Disability Standards for Accessible Public Transport, *available at:* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B? OpenDocument>. *See also* the Disability Rights Education and Defense Fund A to Z list of all nations with laws protecting individuals with disabilities, *available at* <http://www.dredf.org/international/lawindex.html>.

[18] The international goal of achieving uniformity in maritime commerce was long ago recognized with the creation of the IMO, the purpose of which was in part "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation," and "to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." Convention Establishing the Inter-Governmental Maritime Consultative Organization, (March 6, 1948) (renamed Convention on the International Maritime Organization in 1982), Part I, Article 1(a) and (b), 9 U.S.T. 621.

national power on the maritime community. To presume U.S. laws should apply to all foreign ships entering U.S. waters, or that all foreign registries are shams, as urged by Petitioners and their *amici*, creates a dangerous precedent based on an erroneous premise. Such a view encourages other nations to unilaterally apply their laws to American interests abroad.

B. The Lack of Any Cruise Ship-Specific Regulations, Caused by the Complexity of Reconciling Conflicting Laws, Underscores the Need for Legislative Clarification

The DOT and DOJ were directed by Congress to enact ADA regulations for all covered entities, but have acknowledged cruise ships require special consideration and are exempt from shore side regulations.[19] Meanwhile, no regulations have been adopted addressing vessels, nor any of their appurtenances or features. These include, for example, the number of accessible cabins, routes of ingress or egress (i.e., gangways), accessibility standards for life boats, tenders, passageways, raised door thresholds or shipboard lifts, or any of the numerous other shipboard structures. The DOJ in its own ADA Title III Technical Assistance Manual, states: "Because of the unique structure of ships, none of the

[19] In 1991, the DOT observed that "at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels. . . [The DOT] anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels." 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991). The DOT also noted that before promulgating specific requirements for foreign ships it would need to determine whether any treaty provisions, such as SOLAS, might conflict with the ADA and its regulations. *Id.* At 45,600. Likewise, the DOJ declared it "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements." 28 C.F.R. PT. 36, App. B at 664.

ADAAG technical or scoping standards are appropriate. Until such time as the [Access Board] issues specific standards applicable to ships, there is no requirement that ships be constructed accessibly."[20]

Notwithstanding the absence of any statutes or regulations tied to foreign cruise ships, numerous lawsuits have been filed against ICCL members seeking injunctions under the ADA to cease operations pending physical reconstruction of their ships.[21] These actions have demanded compliance with ADAAG, applicable solely to land based

[20] ADA TECHNICAL ASSISTANCE MANUAL, U.S. DEP'T OF JUSTICE, § III-5.3000, illus. 3 (1993). Even if the DOT and DOJ promulgate regulations for cruise ships, their applicability to foreign vessels would remain unclear unless Congress amends Title III.

[21] Reported cases include: *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) [rejecting claims under ADA's construction and alteration provisions when no regulations exist]; *Resnick v. Magical Cruise Co. Ltd.*, 148 F. Supp. 2d 1298 (M.D. Fla. 2001) [no relief available under ADA's construction and barrier removal provisions in the absence of cruise line regulations]; *Access Now, Inc. V. Holland Am. Line-Westours, Inc.*, and *Costa Crociere, S.P.A.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) [denying motions to dismiss and permitting cases to proceed despite absence of applicable cruise line regulations]; *Assoc. for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) [applying Title III's barrier removal provisions to casino cruise ship]; *Disabled Americans for Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 329 F. Supp. 2d 209 (D.P.R. July 14, 2004). *See also Spector v. Norwegian Cruise Line Ltd.*, No. H-00-2649 (S.D. Tex. Sept. 10, 2002) [enforcement of Title III's barrier removal provisions barred absent regulatory guidelines], *affirmed on other grounds, Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650 (5th Cir. 2004), and complaints filed in the following actions: *Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233 (S.D. Fla. 2000); *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.*, No. 00-2255 (S.D. Fla. 2000); *Access Now, Inc. v. Celebrity Cruises, Inc.*, No. 00-2254 (S.D. Fla. 2000); *Access Now, Inc. v. Carnival Corp.*, No. 98-3081 (S.D. Fla. 1998); *Ernst-Rosenkrantz v. Carnival Corp.*, No. 99-0267 (S.D. Fla. 1999); *Giacopini v. Crystal Cruises, Inc.*, No. C-04-1089 (N.D. Cal. 2004); *Walker v. Carnival Cruise Lines*, No. C-98-2926 (N.D. Cal. 1998); *Zetwick v. Carnival Corporation*, No. C-02-0740 (N.D. Cal. 2002).

facilities.[22] The DOJ has intervened in many of these suits, advancing the view Title III applies. Paradoxically, DOJ simultaneously concedes ADAAG cannot be applied. Even the PVAAC, established by the U.S. Access Board to study passenger vessel access, has agreed special regulations are essential. Throughout its deliberations and in its Final Report, the PVAAC identified numerous instances of direct conflict between ADAAG on the one hand, and SOLAS and U.S. Coast Guard requirements on the other.[23]

The ADAAG regulations provide twenty-one recommended examples of steps to remove barriers in land based buildings. However, very different considerations are involved at sea. For example, placement of grab bars and handrails can be affected by the movement of a vessel on the high seas. Installing offset hinges to widen doorways conflicts with SOLAS requirements for specific hardware to

[22] Upon publishing the Draft Guidelines for Passenger Vessels, the Access Board noted with regard to ADAAG "The standards currently used to enforce ADA's transportation provisions cover access to buses, vans, rail cars and other vehicle types but do not address passenger vessels." *Available at* <http://www.access-board.gov/news/pvag.htm>.

[23] The PVAAC identified approximately 90 Code of Federal Regulations sections for ship safety that conflict with ADAAG and need to be reconciled so that shipowners do not violate Coast Guard regulations when complying with accessibility requirements. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, *available at* <http://www.access-board.gov/pvaac/commrept/index.htm>, Ch. 13 and ADAAG/Coast Guard Comparison Index. The PVAAC also identified conflicts with 11 SOLAS provisions including those concerning watertight integrity and the required "coamings of ample heights," means of escape, signage, alarm systems and public address systems. *Id.*. The PVAAC recommended that the appropriate regulatory bodies reconcile the SOLAS conflict relating to audible alarms. *Id.* Ch. 4 § 702.2 Advisory Note. The PVAAC recognized that the necessary economic and physical data required to further develop gangway standards were not readily available, and that such standards will be impacted by high and low water situations at a given location. *Id.* at Ch. 2, § 1005 (Gangways), Advisory note.

ensure doors are watertight and fire safe in a marine emergency.[24] Accessible hardware, required in buildings under the ADA, conflicts with SOLAS' requirement that doors operate electronically from a central location, as well as manually, to prevent internal flooding and the spread of fire. *Id.*

The impossibility of applying the ADAAG regulations onboard ships is not surprising. At the most basic level, buildings do not move, while ships are constantly affected by six degrees of motion – pitch, roll, heave, surge, sway and yaw. Ships are complex and carefully designed to integrate fire safe zones, watertight and automatic fire doors, muster stations, lifeboats, stabilizers, extensive fire fighting and other safety systems, all of which require design elements different from those applicable to land based facilities. The deck capacity, weight restrictions, steel tensile strength, stability considerations, bulkheads, walls, ceilings, fittings and hardware are all unique on ships because they must float; withstand flooding, listing, or movement in seaways; combat fires in the middle of the ocean; connect with piers around the world; navigate through canals; sail through shallow or deep waters; and move at sea without injuring passengers.

Buildings are constructed of easily moveable drywall facilitating physical alteration. Patrons can be readily evacuated to adjacent structures, surrounding property, hospitals and shelters. By contrast, ship bulkheads are constructed of solid steel to ensure watertight and fire safe integrity. Vessels and their lifeboats must function as places of safe refuge while at sea. The design and function of modern international passenger ships demand extensive coordination among experts in marine architecture, engineering, operation, safety and disability accommodations, to determine what accessibility standards can be achieved on the oceans. This effort *must* ensure any regulations do not

[24] *See* SOLAS, *supra* fn. 11, Ch. II-1, Regulation 15.

conflict with shipbuilding standards, international conventions, and classification society requirements adopted by flag states.

II. REQUIRED UNIFORMITY UNDER THE ADA AND IN MARITIME MATTERS IS LOST UNLESS CONGRESS DEFINES THE REACH OF TITLE III, AND THE REGULATORY PROCESS, ONCE AUTHORIZED, IS COMPLETED

Courts are not equipped to fashion injunctive relief in Title III actions brought against foreign cruise ships because neither Congress nor the federal agencies have addressed the issue. Cruise operators cannot determine what constitutes legal compliance. An injunction issued by one court has no preclusive effect upon another plaintiff suing the same cruise line in a different jurisdiction, even with respect to the same ship. These dilemmas undermine the required uniformity embodied in the ADA[25] and fundamental to maritime law. The need for a statutory scheme and regulations is critical for cruise ships traveling to multiple jurisdictions, repositioning seasonally to various parts of the world, and carrying citizens from many nations.

The legal morass concerning Title III has scuttled any notion of uniformity in the cruise industry. Congress's goal of uniform accessibility standards, along with the venerable doctrine of maritime uniformity expressed in the Constitution as an integral part of American law[26], are intended to avoid

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[25] Congress expressed its desire for a consistent nationwide application of the ADA, the purpose of which was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). To effectuate its intent, Congress required the DOT and DOJ to enact accessibility regulations that would create uniform standards for covered entities.

[26] *See* U.S. CONST. art. III, § 2. The importance of national and international uniformity in maritime law is well-established in the

such quagmires. Yet plaintiffs prosecuting ADA lawsuits against cruise operators, including Petitioners, have asked the lower courts to decide how foreign ships should be rebuilt, altered or operated to accommodate special needs. The results have varied in each jurisdiction. Judges must rely solely upon the opinions of paid experts to determine how claims by passengers with disabilities should be reconciled with the unique requirements of oceangoing ships. Cruise lines complying with court orders may be required to undo structural changes upon the enactment of final regulations, assuming the responsible agencies are so authorized.[27]

Foreign ships sailing to or from U.S. ports routinely reposition from one part of the country or world to another with each season. A typical cruise ship could sail from New York, Florida, Texas, California, Washington, Alaska, and Hawaii in one year. Injunctive actions against cruise lines have already been initiated in most of these states.[28] The

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decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221, 1986 AMC 2113, 2124 (1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601, 1973 AMC 2573, 2593-94 (1974) (Powell, J., dissenting); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

[27] Petitioners' reliance on litigation settlements by some cruise lines is neither relevant nor helpful to this Court's analysis. These settlements, reached in the absence of any standards, underscore the need for a congressional framework and comprehensive scheme for applying Title III. As a matter of public policy, the level of accessibility on cruise ships should not depend on the negotiating prowess of private litigants. Such *ad hoc* adjudication, through varying court orders and private settlements, not only fosters confusion, but leads to conflicting results and forum shopping in an industry most in need of national and international uniformity. Moreover, the government has not approved the settlements, and the settling lines are not immunized from subsequent regulatory enforcement of different standards, or compliance with later-developed regulations.

[28] Congressional action and uniform regulations are *essential prerequisites* for application of Title III's accessibility provisions to foreign cruise ships, as exemplified by injunctive suits simultaneously brought against the world's largest cruise line, Carnival Cruise Lines, in California and Florida. Courts in both jurisdictions were asked to issue

following year the same vessel might be based in Europe and never touch a U.S. port. The legal whirlpool created by individual lawsuits is not only unworkable, but also results in great difficulty ascertaining any discernable level of accessibility in the cruise industry. Assuming Congress clarifies the circumstances under which Title III applies to foreign ships, cruise lines can participate in the rule making process and voluntarily comply with meaningful regulations.

A. Bypassing Congressional and Regulatory Clarification of Title III's Application to Foreign Ships Creates Chaos in the Cruise Industry

The complaints brought against cruise lines under Title III typically contain only vague allegations that operators have violated the Act by failing to provide "appropriate" access.[29]

injunctions regarding accessibility and vessel operations and to determine, in lieu of the responsible federal agencies and in the absence of any statutory framework, what modifications should be made to the line's foreign ships. Both prosecuting law firms sought awards of attorney's fees and each retained different "access experts" to render opinions on what modifications were "proper." *See* Complaint, *Walker v. Carnival Cruise Lines* (N.D. Cal. 1998) (No 98-2926); Complaint, *Access Now, Inc. v. Carnival Corp.* (S.D. Fla. 1998) (No. 98-3081). Ironically, these are among the cases that have been settled and which, according to Petitioners, demonstrate why Title III can be applied with ease.

[29] *See, e.g.*, Complaint, *Access Now, Inc. v. Costa Crociere S.P.A.* (S.D. Fla. 2000) (No. 00-7231) [seeking injunction for "appropriate" slopes, handrails, landing areas, signage, routes, or telecommunication devices; to reposition telephones to "appropriate" levels; to provide elevators with "appropriate" visual and auditory indicators and call buttons at "appropriate" heights; to widen doors and doorways (to unspecified widths); to provide "proper" door hardware or "appropriate" opening resistance and/or closing delay, with "appropriate" and "proper" access throughout the rooms, bathrooms, and around furniture; to provide "appropriate" life safety devices, or provide the "requisite" electrical outlets and shelf space, "requisite" signage throughout the ship for all

Congress has not specified whether, when or to what extent Title III governs foreign ships. No regulations specify the number of accessible cabins required on any vessel, or the "proper" width of doorways, "appropriate" height and type of handrails, switches, service counters, or other facilities. Cruise operators have no guidance on how to reconcile requested changes with foreign and international standards.

SOLAS governs the placement of bulkheads, main vertical zones and stairtowers; water tight doors with raised thresholds and automatic fire doors; and affects the extent to which ships can be made as accessible as buildings, buses or trains in the United States.[30] Signage requirements applicable to land based buildings conflict with those for cruise ships under SOLAS, directing the flow of passengers to lifeboats and muster stations in an emergency.[31] SOLAS dictates unobstructed emergency egress and doors, mandatory participation in fire drills and musters, and proper design and use of life rafts, boats and tenders.[32] All of these laws, to which foreign cruise ships *must* adhere, place necessary

accessible routes; and the "requisite" number of guest rooms in all price categories for disabled individuals]. *See also*, Complaint, *Access Now, Inc. v. Cunard Line Ltd.*, (S.D. Fla. 2000) (No. 00-7233); Complaint, *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.* (S.D. Fla. 2000)(No. 00-2255); Complaint, *Resnick v. Walt Disney Co.* (M.D. Fla. 2000) (No. 00-898); Complaint, *Access Now, Inc. v. Holland America Line-Westours, Inc.* (S.D. Fla. 2000) (No. 00-7230); Complaint, *Access Now, Inc. v. Celebrity Cruises, Inc.* (S.D. Fla. 2000) (No 00-2254); Complaint, *Ernst-Rosenkrantz v. Carnival Corp.* (S.D. Fla. 1999) (No 99-0267); Complaint, *Access Now, Inc. v. Carnival Corp.* (S.D. Fla. 1998)(N0 98-3081).

[30] SOLAS requires that vessels be equipped with watertight bulkhead doors which can be closed remotely. SOLAS, *supra* fn 11, Ch. II-1, Regulation 15. The Convention also requires that such doors be equipped with manual opening devices and hardware. *Id.* Recent lawsuits against cruise lines claim the lines have violated the ADA by complying with these requirements.

[31] *See* SOLAS, *supra* fn. 11, Ch. II-2, Regulation 28.

[32] *See* SOLAS, *supra* fn. 11, Ch. II-2 Regulation 28-1, Ch. III, Regulations 8, 11, 19, 21, 23, 25, 30.

limitations on shipboard accessibility for disabled patrons.

Countless questions are therefore unanswered. Are accessibility modifications required for muster stations, lifeboats, all or only some public restrooms, decks, or cabin categories? Are ramps required at all doorways, cabin doorways, restroom doorways, emergency doorways, or only in cabins designated as "wheelchair accessible?" How do space constraints in life boats and the traditional safety duties of the crew in maritime emergencies affect the number of wheelchair passengers who may be carried on board? Should the lack of rapid availability of shore-based resources limit the number of accommodations for guests with special needs as compared to hotels, busses or trains? Where should accessible cabins be located in relation to exits (which change from port-to-port depending upon tides and local facilities), and where should patrons with communication impairments be situated? What is the effect of tidal changes in ports around the globe on gangway accessibility? Under what circumstances can tenders be modified and used by passengers with various disabilities?

Undoubtedly, many such questions led the Access Board, DOT, and DOJ to defer application of the structural aspects of the ADA to cruise ships. Under these circumstances, and because Congress has yet to address the reach of Title III at sea, application of a case-by-case "readily achievable" standard destroys maritime uniformity and is untenable and unfair. In case of a shipboard emergency at sea, it could jeopardize lives.

B. The Access Board's Recent Publication of Draft Guidelines Does Not Obviate the Need for a Congressional Framework

Plaintiffs in ADA lawsuits have asserted landside ADAAG regulations provide adequate guidance to foreign cruise ships for necessary barrier removal. Others have argued the PVAAC Final Report supplies the requisite standards. Petitioners now contend the Access Board's draft guidelines published on November 26, 2004 should be applied. The very fact that Petitioners and their *amici* assert differing "guidelines" should be followed underscores the conundrum cruise lines face with respect to Title III.

The PVAAC Final Report recommendations are not *regulations*. Indeed, they have been changed in various respects by the Access Board in the "draft guidelines." The DOJ has indicated draft guidelines are of no legal consequence.[33] Ordering foreign ships to be modified at this juncture, based on draft guidelines alone, in the absence of any congressional authorization, improperly subjects cruise operators to a multiplicity of lawsuits, regulatory action and modifications.

Despite consultation with an advisory committee and over six years of review, the efforts of the Access Board and responsible agencies have resulted in only partial draft recommendations. These draft guidelines raise numerous engineering issues caused by peculiar vessel design. A multitude of unanswered questions are posed to cruise

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[33] The DOJ stated when publishing the Advance Notice of Proposed Rulemaking for Revised ADAAG: "The ADA requires the Department to publish regulations that include accessibility standards that are consistent with the Access Board's guidelines. Until the Department's rulemaking is complete, the revised ADA Guidelines are effective only as guidance to the Department (and to the Department of Transportation). *The revised guidelines have no legal effect on the public.*" (Emphasis added). *Available at* <http://www.ada.gov/proposal.htm>.

operators.[34] The Board, in its "Draft Plan for Regulatory Assessment," is now seeking comments from designers, shipyards and vessel operators regarding the impact of scoping and technical provisions on newly constructed ships.[35] The Board has identified 36 instances in which the draft guidelines require additional space or new features on a vessel, or raise other design challenges.[36] The complexity of issues, remaining procedural steps before final regulations can be promulgated, and the pending question of congressional intent concerning foreign ships, preclude reliance on draft guidelines to support Petitioners' claims.[37]

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[34] The Notice of Availability of Draft Guidelines ("NADG") presents more than 100 questions of scoping, general application and qualification. The draft guidelines indicate the Access Board, DOJ and DOT are not prepared to implement regulations for passenger vessels without a great deal of research and a comprehensive cost benefit analysis. Among the questions posed by the Access Board are: "What should be considered a new vessel, triggering the requirement that the vessel be built to fully comply with the Access Board's guidelines?" "Is it feasible to require that these vessels provide an accessible means of embarking and disembarking passengers with disabilities at all foreign ports of call despite the allocation of responsibility for providing such services in the U.S.? What additional consideration should be made in addressing foreign ports of call?" "Are there reasons to treat accessibility requirements for on-board amenities any differently on vessels than elsewhere?" "Should 'readily achievable' barrier removal concepts apply 'unaltered' to passenger vessels?" (*See* 69 Fed. Reg. 69,247-69,2450 (Nov. 26, 2004)). Clearly the Access Board is concerned about extraterritorial application, has not "worked through the issues" and has not issued draft guidelines that "are fully consistent with SOLAS" as advanced in Amicus Brief of the Solicitor General of the United States, p 28.

[35] *Available at* <http://www.access-board.gov/pvaac/assess-plan.htm>.

[36] *Id.*

[37] Not until four years after the PVAAC issued its Final Report did the Access Board issue its NADG, on November 26, 2004, immediately after this Court granted review. As required by the APA (5 U.S.C. § 553), the next step in the process is a period during which the public, including cruise lines and other interested parties, may comment on the draft. Subsequently, there will still be the ANPRM (Advanced Notice of Proposed Rule Making) and NPRM (Notice of Proposed Rule Making), each to be followed by the required comment period and hearings. Then the OMB (Office of Management and Budget) will be required to perform a cost-benefit analysis. After this extensive process, final guidelines will be published. The DOT and DOJ will later issue regulations based on the guidelines, and after a period for voluntary compliance, final regulations become binding. The process of promulgating regulations applicable to cruise ships is still in its infancy. The question of extraterritorial application is unresolved, so the applicability of Title III remains entirely unclear.

The Access Board's latest inquiries also illustrate the draft guidelines have not eliminated conflicts with SOLAS, as asserted by Petitioners and their *amici*.[38] Neither Petitioners nor their supporting *amici* mention existing conflicts between the draft guidelines and *other* international and foreign standards. For instance, IMO guidelines, adopted by individual nations, sensibly require accessible cabins to be located "in the proximity of" the embarkation deck to ease life boat use and emergency evacuation.[39] Conversely, the Access Board's draft guidelines call for dispersion of accessible cabins throughout all levels of a ship.[40] The United Kingdom, hardly a "flag of convenience," has adopted the IMO standard. Actual conflicts therefore exist between British law and the U.S. draft guidelines.[41] The famous QE2, for

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[38] *See* Brief of Petitioners 45-46. Rather than providing a solution to one of the most basic accessibility issues – boarding and disembarking ships, affected by weather, tides, terminal facilities, gangways and mechanical devices, the Access Board has advised vessel and pier operators to "negotiate an allocation of responsibility for compliance." *See* Draft Guidelines, "Discussion of Provisions" § V208, *available at* http://www.access-board.gov/pvaac/guidelines.htm.

[39] MSC Circular 735, *supra* fn. 10, at § 4.1.

[40] Draft Guidelines § V224.2, *available at* <http://www.access-board.gov/pvaac/guidelines.htm>.

[41] The British DPTAC guidelines, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>.(*See* fn. 17, *supra*) require unisex wheelchair-accessible bathrooms, (DPTAC § 2.28), whereas U.S. draft guidelines require wheelchair accessible facilities in both the men's and women's restrooms in newly constructed vessels

example, duly registered in the U.K., constructed to meet U.K. standards and only rarely calling in U.S. ports, cannot determine how to follow both structural approaches. According to the *Stevens* criteria, this ship which in 2005 will spend less than 48 hours in U.S. ports, would have to be retrofitted to meet U.S. law, only to have these physical changes dismantled after leaving U.S. waters.

Congress expressly provided in Title I that foreign law would control in the event of conflicts with the ADA. *See* 42 U.S.C. § 12112 (c)(1).[42] Title III is silent on this point. No provision reconciles barrier removal with other laws. The government nonetheless opines, without statutory support, that any barrier removal in conflict with an *international treaty* would not be deemed "readily achievable." (*See,* Amicus Brief of the Solicitor General of the United States, p. 27.) Neither Title III nor the draft guidelines state or imply that barrier removal is not readily achievable if inconsistent with international law.[43] As one court observed, "Such a brief [of the government] in such circumstances cannot claim much

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(V213.2); the U.K. requires elevator doors to have clear opening of at least 900mm (DPTAC § 5.7), whereas the U.S. requires a minimum of 915mm (V407.4.1); U.K. requires minimum bathroom doors of 900mm with a maximum opening force of 15 newtons (DPTAC § 2.29), whereas the U.S. requires a minimum of 815mm and maximum force of 22.2 (V404.2.3, V404.2.9); U.K. requires a maximum of 1:12 ramp slope (DPTAC § 5.19), whereas the U.S. allows a slope of 1:8 (V405.2) (thus compliance with U.S. standards as to bathroom door size, opening force and ramp slope would actually violate U.K. standards).

[42] Section 12112 (c) (1) provides "It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination…if compliance with this section would cause such covered entity to violate the law of the foreign country in which the workplace is located." Title III contains no comparable provision.

[43] The "readily achievable" criteria of Title III include only: the cost of the remedial action, financial resources of the facility and covered entity, and type of operation, including composition and functions of the workforce and relationship of the facility and covered entity. 42 U.S.C. § 12181 (9) (A) through (D).

democratic legitimacy to set over against the intent of Congress so far as it can be gleaned from the usual interpretive sources – which do not include the brief of one of the parties!" *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 563 (7th Cir. 1999). Congress, not the Solicitor General, must state how a Title III covered entity and the courts should deal with conflicts between applicable laws.

The Solicitor General's opinion that Title III barrier removal in conflict with international conventions would not be "readily achievable" fails to address conflicts with *foreign law*. Conceding the existence of conflicts between U.S. accessibility standards and those promulgated abroad, the government overlooks the existence of conflicts with standards imposed by other flag states, port states, or nations where ships are constructed or classed. That the U.S. contends its accessibility standards should apply to ships entering U.S. ports acknowledges the potential for the application of other nations' standards to the same ships. Cruise operators with global operations must have reliable guidance, apart from the government's amicus brief, to enable them to determine which laws govern. A clear mechanism for conflict resolution, addressing applicable foreign *and* international law, must be established, particularly in an international industry in which uniformity is paramount and passenger safety of overriding concern.

The government's "argument" that barrier removal would not likely be required if in conflict with international (but not foreign) law overlooks a more basic problem – the lack of *any* regulations for barrier removal on *any* ships. To properly determine whether a requested barrier removal is "readily achievable," a court, like a cruise line, must be able to identify the applicable legal standards. No guidance exists for addressing barrier removal on cruise ships. No court can properly reach, let alone answer, the question of whether any requested modification is "readily achievable."

III. COURTS CANNOT APPLY THE ACCESSIBILITY PROVISIONS OF TITLE III TO FOREIGN CRUISE SHIPS UNLESS CONGRESS FIRST AMENDS THE ADA

Petitioners and their *amici* urge this Court to extend the accessibility provisions of Title III to foreign cruise ships under the "readily achievable" standard in the absence of *any* statutory directive *or* applicable regulations. They ignore the legislature's mandate to delay the effective date of the Act until rule making was complete.[44] They maintain that court imposed, after-the-fact decisions on accessibility constitute an appropriate application of the Act.

Permitting Title III suits under these circumstances raises serious administrative and constitutional law concerns. Should this Court accept Respondent's arguments, it need not reach these concerns. However, should this Court accept Petitioners' arguments, several significant corollary issues will necessarily remain in this action on remand and will be present in any other action involving a Title III claim against

[44] The unambiguous language of Title III proves Congress intended that accessibility regulations be created, with notice to covered entities and opportunity for compliance, before liability for barrier removal would be triggered. Congress delayed the effective date of the ADA until eighteen months after it was passed, (42 U.S.C. § 12181) and directed that the regulatory agencies "shall" adopt specific standards for covered entities to give the Act meaning (42 U.S.C. § 12186). The DOT and DOJ were to issue regulations to carry out the provisions of Title III within one year of enactment. (42 U.S.C. § 12186). Thus, covered entities had six months after regulations were adopted to comply with the standards established. Had Congress intended barrier removal to be accomplished without any regulatory direction, it could have required immediate compliance and included that section in those having immediate effect. The DOJ has further announced the "requirement for barrier removal . . . shall not be interpreted to exceed the standards for alteration in Subpart D of this Part." The Justice Department thus believes Congress intended barrier removal to be limited by the scope of existing regulations.

a cruise line. Chief among these is the practical difficulty cruise lines and courts will face in understanding how to apply Title III in the absence of any congressionally required regulatory direction. In that instance, this Court should provide appropriate guidance to lower courts adjudicating Title III claims against cruise lines.

ICCL asks the Court to clarify that no Title III claim involving a foreign cruise ship can become viable until Congress amends Title III *and* the appropriate regulatory agencies discharge their statutory responsibility to promulgate regulations, providing cruise lines the opportunity for voluntarily compliance. Otherwise, the result is that two classes of covered entities would be created under the Act. The first would encompass those U.S. facilities on land, for which Congress expressly extended Title III and specific standards were created to allow compliance. The second would consist solely of foreign cruise ships, subject to a case-by case choice of law analysis and "readily achievable" criteria with no specific standards. Only owners of facilities on land would receive advance notice of what must be done to avoid being sued. Petitioners and their *amici* apparently believe neither Congress nor the regulatory authorities should provide operators of foreign cruise ships equal consideration.[45]

Clear legislative direction, with specific regulations, is required to extend extraterritorial application of Title III to foreign ships. Presently, as conceded by Petitioners, operators

[45] Ignoring the statutory scheme, the Solicitor General contends cruise operators must remove barriers in the absence of *any* standards. On the one hand the government concedes a ship need not be constructed accessibly (see discussion at footnotes 19, and 44, *supra*), but on the other hand argues operators should be liable for failing to guess what barriers must be removed before the ship is launched. Requiring shipowners to reconstruct vessels to meet unspecified levels of accessibility, when not requiring the same shipowners to construct or renovate ships according to any standard, epitomizes circular logic.

of foreign cruise ships are left with only two words to assess whether their conduct violates the law: "readily achievable." The lack of any discernable standards or regulatory guidance, from the very agencies now contending application of Title III to foreign ships is essential, highlights the weakness of Petitioners' contentions. The only "standard" is whether an individual judge or regulator will deem a requested modification "accomplishable without much difficulty or expense." 42 U.S.C. § 12181 (9). To guess accurately, a cruise operator must speculate how to factor in such parameters as the cost of the modification, the resources of the facility and operator, and the relationship of the facility to the operator. *Id.*, § 9 (A) – (D). The cruise operator is left to speculate over conflicts between the undefined standard of accessibility, foreign and international laws, and concerns for passenger safety. If the operator's analysis later conflicts with a judge's *post facto* determination, liability attaches merely because the operator guessed wrong. No other entity covered by the ADA, let alone an entire industry, is placed in such a precariously vague predicament.[46]

The extension of the ADA to foreign ships advanced by Petitioners delegates basic policy matters to judges and juries

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[46] This Court aptly observed in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . .

for resolution, after the fact, on an *ad hoc* and subjective basis. The attendant dangers of arbitrary and discriminatory application become apparent. Certainly, foreign cruise ships are entitled to a more deliberative, public and systematic procedure than the *ad hoc, post facto* determinations urged by Petitioners.[47]

Title III is silent on its application to foreign cruise ships. The agencies directed to promulgate regulations have not done so. Congress stayed enforcement of Title III's barrier removal provision until after regulations were enacted. Under these circumstances, the only statutory interpretation consistent with congressional intent, and which avoids subjecting foreign cruise ships to a different standard than land-based facilities, is that Title III does not yet apply to foreign cruise ships.

The lower courts should not interfere in the legally required legislative and regulatory process by holding cruise operators liable for failing to comply with the PVAAC Report, draft guidelines, inapplicable ADAAG standards, or a vague notion of what is otherwise "readily achievable." Rather, this Court should defer to Congress to specify the extent of the ADA's reach. Assuming an amendment is duly enacted, then the DOT and DOJ should complete the rule making process of and create final cruise ship regulations.

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[47] In *Doe v. Mutual of Omaha Insurance Co., supra*, plaintiff alleged defendant violated the ADA by capping insurance benefits for AIDS patients. The DOJ's *Technical Assistance Manual* expressly prohibited discrimination by insurers in the conditions contained in insurance contracts, and the DOJ filed an *amicus* brief arguing defendant's conduct violated the ADA. However, as in the present situation, the DOJ had not promulgated regulations governing coverage limits at issue in *Doe*. The court rejected the ADA claim, holding: "Displacing the regulation of the insurance industry into the federal courts is a sufficiently far-reaching interpretive stride to justify us in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus curiae brief." *Id.* at 563.

IV. CONCLUSION

For all the foregoing reasons, the decision of the Fifth Circuit Court of Appeal should be affirmed.

DATED: January 27, 2005

Respectfully submitted,

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No. 03-1388

IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,
Petitioner,

v.

NORWEGIAN CRUISE LINE, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* MEDITERRANEAN SHIPPING COMPANY CROCIERE, S.p.A.

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act ("ADA") apply to foreign-flagged cruise ships?

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BRIEF OF *AMICUS CURIAE* MEDITERRANEAN SHIPPING COMPANY CROCIERE, S.p.A.

INTEREST OF THE *AMICUS CURIAE* [1]

Mediterranean Shipping Company Crociere, S.p.A. ("MSC") is a family-owned company, duly formed and existing under the laws of Italy. MSC currently owns and operates seven cruise vessels that, as our name implies, offer

[1] The parties in this case have consented to the filing of *amici* briefs. Letters of consent are on file with the Clerk of this Court. In accordance with Supreme Court Rule 37.6, MSC affirms that no counsel for any party has authored this brief in whole or in part and no person or entity, other than MSC, contributed monetarily to the preparation or submission of this brief.

itineraries that are predominantly in the Mediterranean. Of the cruise vessels we own and operate, several fly the Italian flag. At the present time, two of our seven cruise vessels offer a transatlantic and Caribbean itinerary and the only contact that these vessels have with the United States is when guests embark at Port Everglades, Florida for cruise itineraries in the Caribbean and South America.

We take great pride in the fact that we are a family owned and operated company. We also take pride in our Italian heritage and the hospitality we offer to all our guests. We believe that we offer something unique to our guests, something special, something that is not available on any other cruise line and which, depending upon the Court's decision in this case, may no longer be available to American citizens who are unwilling or unable to embark and disembark our cruises in ports other than those located in the United States. Indeed, if the Court determines that Title III of the Americans with Disabilities Act ("ADA")[2] applies to foreign-flagged vessels while in American ports, MSC will likely cease offering embarkation and disembarkation in the United States and will be required to plan alternate routes for our vessels so as to completely avoid U.S. territorial waters. The costs associated with complying with the law, coupled with the increased exposure to litigation and administrative proceedings, will simply outweigh any incentive, economic or otherwise, that may exist for us to offer our cruises in the United States.

We are confident that the substantive legal arguments will be addressed by the parties and other *amici* and write primarily to offer just one example, albeit relevant and important, of how far reaching and impractical the extra-territorial application of the ADA would be.

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[2] 42 U.S.C. 12181 *et seq.*

However laudable their goals, Petitioner and their amici would have this Court take on the task of applying this law in such a way that Congress, the branch of government responsible for enacting the law, did not expressly intend and which conflicts not only with the United States' treaty obligations but also with the historical separation of powers that the framers drafted into the U.S. Constitution.

We respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

We begin with an affirmation of the belief that all people, regardless of physical or psychological condition, are entitled to respect and should, to the extent possible, be able to enjoy and participate fully in all the pleasures of a cruise holiday.

Toward this end, and in accordance with our obligations under Italian and European Union law[3], MSC has developed (and continues to develop) a disabled guest policy. We firmly believe that we have a duty to give focused and special attention to guests who are developmentally challenged. From the moment they make a reservation with us (or a travel agent as the case may be) until they leave the passenger

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[3] *See e.g.*, Chapter III, Article 20 of The Charter of Fundamental Rights of the European Union prohibiting discrimination "based on *any* ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership in a national minority, property, birth, *disability*, age or sexual orientation." (*emphasis supplied*). See also Article 26 of this same directive entitled "Integration of persons with disabilities" provides that "The Union recognizes and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.", Council Directive 98/18/EC, Council Directive 99/35/EC (addressing accessibility of passenger ships for visually impaired citizens); Council Directive 98/41/EC (providing guidelines for passenger ship masters).

terminal at the end of the cruise, we attempt to offer whatever assistance our guests require.

Notwithstanding attempts by Petitioners and their amici to portray all cruise vessel owners and operators as multi-billion corporations, with a significant presence in the United States, and whose sole motivation for engaging in this business activity is deriving revenue from Americans, our experience proves otherwise.

Insofar as we do not have any employees in the United States, we rely on third parties (i.e., agents) to accept reservations and to notify us in the event that a guest seeking to cruise with us has a disability or, for that matter, any other special requirements that we need to be aware of in order to insure that *all* our guests have a safe and enjoyable holiday. Strangely, Petitioner and their amici find this offensive and/or discriminatory. *See e.g.*, Petitioners brief at pp. 17-20. Presumably, if we did *not* ask our guests about disabilities or special needs and, consequently, were not equipped to meet those needs, we would be accused of being insensitive and failing to meet our obligations under the ADA.

As soon as we are advised that a disabled passenger has made a reservation with us, the process of meeting (and hopefully even exceeding) that guest's needs and desires is initiated. Our head office in Naples, Italy is notified and arranges for a "Special Assistance Squad" to be on board. The squad consists of the following; Master, Staff Captain, on-board physician, Safety Officer, Deputy Purser, Hotel Manager, Housekeeper, Cabin Steward, bellperson, Maitre d'Hotel, Bar Manager and Cruise Director, each of whom are informed of the particular guests presence on board and, to the extent we are advised by the guest, any special needs or requests.

While we make a concerted effort to anticipate our guests' needs, we do not have the capacity to read any guest's mind.

Our ultimate concern, of course, is the health and safety of all our passengers. In point of fact, if we are required to comply with Title III of the ADA, we run the risk of subjecting ourselves to liability for violations of other laws with which we must comply and offending other passengers who pay the same amount and, in many instances, more for the pleasure of boarding our cruise ships and experiencing the unique hospitality we offer.

For example, what if one of our disabled guests has a service dog that they wish to bring aboard with them? If we restrict this guest's access to say, for instance, our magnificent buffet area so as to prevent the possibility that the service dog's fur from entering other guests' food, are we discriminating against our disabled guest? What if the health code or sanitary laws of another port of call prohibit any animal from being within a specified proximity of food preparation or dining areas? Are we permitted and, perhaps, even required to inquire of all our other guests if they have allergies to dogs so as to insure that they are not placed in close proximity to a guest who is accompanied by a service dog? Are we violating the law if we require a guest with a service dog to dine in a specific area of the vessel so as not to interfere with the dining experiences of other guests who, for whatever reason, might be offended by the presence of an animal while they are eating? Do we need to hire a veterinarian or will we be subject to a lawsuit if we fail to provide medical care to a service dog that becomes injured or ill? Where is a vessel owner or operator to turn for answers?[4]

Each time questions of this nature or a compliance issue presents itself, are we required to spend thousands of dollars

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[4] *See* DOJ, *COMMONLY ASKED QUESTIONS ABOUT SERVICE ANIMALS IN PLACES OF BUSINESS* available at http://www.usdoj.gov/crt/ada/qasrvc.htm (last visited January 24, 2005). We note, with interest, that there was (and is) no mention of cruise ships as one of the types of business to which the ADA applies.

consulting U.S. attorneys who are, apparently, in no better position to assure us that a particular course of conduct on our part will (or will not) subject us to allegations of discrimination?

We respectfully offer, for this Court's consideration, our own experience with the Department of Justice's ("DOJ") attempt to apply Title III of the ADA to our company.

In July, 2003, one of our agents in New York received correspondence from the DOJ notifying us that a Complaint was filed against our company, requesting information pertaining to our company and advising us that the DOJ would appreciate our cooperation in providing it with information and documents necessary for a thorough evaluation. The Complaint alleged that we failed to comply with Title III of the ADA because we refused to allow a patron to bring a certified hearing dog on one of our vessels.[5]

The allegation that we refused permission to a service animal was admitted because, after consulting with (and relying upon) the advice provided by an American law firm, we reached an agreement with this individual to provide her, at no additional cost to her, with an attendant.[6]

Thereafter, DOJ informed us that it had determined that MSC's "policy of precluding all service animals on all cruise

[5] The individual seeking to bring her service dog on board was demanding, among other things, a four foot by four foot by two foot box, filled with mulch, for her service dog.

[6] This "patron" advised our agent that she was canceling her cruise with MSC, not because of MSC's refusal to allow her service dog on board but, rather, because "I will be going into a hospital in New York City for an operation." With all due respect, we were left to wonder if the service dog would be accompanying her into the operating room of the hospital insofar as hospitals provide lodging, dining facilities and other services to the public, they too are, presumably, covered by Title III of the ADA.

ships, notwithstanding the offer to provide an attendant to the complainant while aboard the ship, violates Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. Sections 12181-12189, and the Department of Justice's implementing regulation, 28 C.F.R. Part 36." Relying upon the Fifth Circuit Court of Appeals decision in this case, MSC declined the DOJ's invitation to alter our disabled passenger policy to allow service dogs aboard our vessels.

Contrary to the arguments set forth by Petitioners and their amici, Title III of the ADA does not currently apply to and, in point of fact, should not apply to foreign-flagged vessels. The DOJ's own website is illustrative on this point. DOJ indicates "Ships registered under foreign flags that operate in United States ports *may* be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement."[7] (*emphasis supplied*). As we read this, it is entirely possible that ships registered under foreign flags that operate in United States ports may *not* be subject to the ADA.

Petitioner and its *amici* offer a myriad of reasons why deference to the laws of so called "flags of convenience" is not warranted. We respectfully submit that the Italian flag does not fall within this category. Moreover, we are constrained to point out that most scholars attribute the selection of flags of convenience in response to another impractical U.S. law (i.e., the 18th amendment to the Constitution), a law which was subsequently repealed.[8]

[7] *See* DOJ, *Americans with Disabilities Act Title III Technical Assistance Manual 1994 Supplement* available at http://www.usdoj.gov/crt/ada/taman3up.html (last visited January 24, 2005).

[8] See H. Edward Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 Tulane Maritime Law Journal 139, 156 (1996). *See also*, U.S. Constitution 21st Amendment.

Title III of the ADA does not currently apply to foreign-flagged ships because, as the Fifth Circuit correctly noted, in the absence of express language to the contrary, there is a presumption against extra-territorial application of U.S. law.

As a practical matter, even today, a cruise vessel owner, flying the *American* flag, is not able to determine whether it is in compliance with the ADA yet, under Petitioners' and its amicis' analysis, the vessel owner and operator are still liable. Some 14 years after the law's enactment, the federal agencies charged with the responsibility of adopting comprehensive regulations and guidelines pertaining to Title III, have *still* not done so for cruise vessels. See Petitioner's brief, p. 5, fn. 1. Why? Is it because both DOJ and DOT realized, both at the time that Title III was enacted and even today, that application of Title III to cruise ships was (and is) not practical given the physical characteristics of cruise vessels including, primarily, the fact that they operate in a marine environment? Have they come to the conclusion, through years of research and discussions on the implications of applying Title III to cruise vessels, that application of Title III to *any* vessel, regardless of what flag she flies under, is not "readily achievable?" 42 U.S.C. 12182(b)(2)(A).

We are not suggesting that unbridled laissez-faire capitalism can operate to resolve the issue of discrimination against persons with disabilities. Nor are we suggesting that laws governing accessibility of passenger ships are an inappropriate means by which to prevent such discrimination from occurring. Rather, given the nature of cruising, we are of the opinion that a *truly* comprehensive (i.e., international) approach is what is needed so that the rights of *all* persons (legal and actual) are protected.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit in this case must be upheld.

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BRIEF OF *AMICI CURIAE*, NINE ASSOCIATIONS REPRESENTING PERSONS WITH DISABILITIES, IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 03-1388

DOUGLAS SPECTOR, *et al.*,
Petitioner,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, NINE ASSOCIATIONS REPRESENTING PERSONS WITH DISABILITIES, IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are nine associations of people with disabilities, public interest groups, and other organizations that advocate for the rights of people with disabilities, including AARP, American Diabetes Association, Alexander Graham Bell Association for the Deaf and Hard of Hearing, Association on Higher Education And Disability, Judge David L. Bazelon Center for Mental Health Law, Depression and Bipolar Support Alliance, Disability Rights Education and Defense Fund, Inc., National Association of Councils on Developmental Disabilities, and the National Association of the Deaf. These organizations, the interests of which are described in greater detail in the Appendix, wish to ensure that the Court is fully apprised that the cruise line industry

has substantial and continuous contacts with the United States, and wish to ensure that Title III of the Americans With Disabilities Act ("ADA") is applied to cruise lines and their foreign-flag ships that do business in the United States.*

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit in this case would erect erroneously a barrier against application of Title III of the ADA[1] to cruises by Americans on foreign-flagged cruise ships present in the U.S. It would stand for the proposition that by registering under a foreign flag, a cruise line earns a free pass to discriminate against persons with disabilities, regardless of the cruise line's substantial contacts with the U.S. in marketing and operating its cruises.

The decision fails to give effect to instructive holdings in a closely analogous line of cases, which conclude that substantial and continuing contacts with the U.S. are to be accorded more weight than a vessel's flag. The activities of the cruise industry demonstrate that cruise lines operating foreign-flagged ships overwhelmingly maintain substantial and continuing domestic contacts with the U.S. For this reason, in addition to others, Title III of the ADA should apply to foreign-flagged cruise ships and their cruise lines that do business in the U.S., and the decision of the Fifth Circuit in this case should be reversed.

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* The parties in this case have consented to the filing of *amici* briefs. Their letters are on file with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the preparation or submission of this brief.

[1] 42 U.S.C. § 12101 *et seq*.

Further, foreign-flagged vessels have been held to be subject to various other general commercial and civil rights statutes. Indeed, the agreement of some cruise lines to retrofit foreign-flagged ships in order to settle ADA litigation puts to rest any burden or feasibility argument.

Amici request that the Court of Appeals decision be reversed and the case proceed with full application of Title III of the ADA.

ARGUMENT

I. TITLE III OF THE ADA IS PROPERLY APPLIED TO CRUISES ON FOREIGN-FLAGGED SHIPS GIVEN THE SUBSTANTIAL CONTACTS THAT THE CRUISE LINES HAVE WITH THE UNITED STATES.

Title III applies to cruise lines operating foreign-flagged vessels in the United States, just as if they were operating U.S.-flagged vessels here. Major cruise lines, virtually all of whom operate vessels under foreign flags, have substantial contacts with the United States, enjoy significant benefits in locating and conducting their businesses in the United States, and use tremendous marketing and advertising to reach and appeal to the public in the U.S. These contacts with the U.S. overwhelm any consideration of the ship's flag of registry, and require application of the ADA for foreign-flagged cruise ship lines that do business in the U.S.

A. Substantial and Continuing Contacts With the United States By Foreign-Flagged Cruise Ship Lines Weigh More Significantly Than the Foreign Flag Itself.

This Court has ruled that the fact that a ship is registered under the flag of a foreign country does not exempt its owner from U.S. law where the owner and ship have substantial U.S.

contacts.[2] In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the Court held that the Jones Act applied to permit an action in U.S. courts by a foreign employee against the foreign shipping line for injuries occurring on a foreign-flagged ship in U.S. waters. In applying a contacts-based analysis, the Court contrasted "the façade of the operation" with "the nature of the operation."[3] It took "a cold objective look at the actual operational contacts that this ship and this owner have with the United States."[4] It found determinative that the foreign corporation that owned the vessel maintained its largest office in New York, that the ship was not merely a "casual visitor" to the U.S., that "it and many of its sister ships were earning income from cargo originating or terminating here," and that its owner "engaged in an extensive business operation in this country."[5] Weighing the factors articulated in *Lauritzen v. Larsen*, 345 U.S. 571 (1953)[6] for deciding choice of law under maritime law, the Court held that "[t]he flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the

[2] *See, e.g., Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).

[3] 398 U.S. at 310.

[4] *Id.*

[5] *Id.*

[6] In *Lauritzen*, the Court applied maritime law principles "of impressive maturity and universality," 345 U.S. at 581, to identify seven factors for deciding a choice-of-law question: the place of the alleged wrong, the law of the flag, allegiance of domicile of the injured, allegiance of the defendant ship owner, place of contract, inaccessibility of the foreign forum, and law of the forum. *Id.* at 582-92.

substantial and continuing contacts that this alien owner has with this country."[7]

Further, the Court in *Rhoditis* made clear that the significance of the U.S. contacts "must be considered in light of the national interest served by the assertion of Jones Act jurisdiction."[8] The ADA is of equal stature in this regard. Congress stated that a purpose of the ADA is "to provide a clear and comprehensive *national mandate* for the elimination of discrimination against individuals with disabilities."[9]

The U.S. contacts by foreign-flagged cruise ship lines, particularly in light of the broad policy and purpose of the ADA, require that Title III of the ADA be applied to protect American passengers who take cruises on Respondent's foreign-flagged ships. The eradication of discrimination based upon disabilities is a significant national and a part of the setting in which foreign-flagged cruise ship lines choose to interact with the American public. Despite their substantial activities here, Respondent fails to acknowledge that the ADA protects the very Americans whom it seeks as passengers, in the very activities it seeks to sell.

[7] *Id.* at 310.

[8] 398 U.S. at 309. Although the Jones Act was subsequently amended to restrict such actions (*see* 46 U.S.C. § 688 (1994 App.)), the contacts analysis is equally valid in the ADA context. The Jones Act prior to amendment did not expressly state that it would apply to foreign-flagged ships, but that did not deter the Court from applying it to protect the foreign seaman in *Rhoditis*. *See EEOC* v. *Kloster Cruise, Ltd.*, 939 F.2d 920 (11th Cir. 1991)(relying on *Lauritzen* and its progeny to enforce an administrative subpoena to investigate allegations of employment discrimination by *Kloster* where, as in the instant complaint, it was suggested that discriminatory activities occurred in the United States as well as aboard a foreign-flagged ship).

[9] 42 U.S.C. § 12101(b)(1) (emphasis added).

B. The Cruise Industry Continuously Seeks and Maintains Contacts With the United States In Doing Business and Soliciting Customers.

Major cruise lines, including the Respondent, have their headquarters in the United States, enjoy great benefits in locating and conducting their businesses here, and generate significant marketing and advertising in the U.S. to draw American consumers. Some of the details of these contacts are described here.

1. *The United States is Overwhelmingly the Cruise Industry's Most Significant Venue.*

The largest source of business by far for the cruise line industry is the United States—where cruising has become a mainstream alternative to onshore resort and sightseeing vacations.[10] North American ports handle some eighty percent of all cruise line embarkations.[11] The International Council of Cruise Lines, an industry consortium of the world's major lines,[12] claims the cruise industry contributed

[10] *See* Carnival Corporation SEC Form 10-K (Nov. 30, 2003) at 8-9, available at http://sec.freeedgar.com/displayText.asp?ID=2789703 (hereafter "Carnival 2003 10-K")(last visited Dec. 2, 2004)("According to G. P. Wild (International) Ltd., approximately 7.6 million North American sourced cruise passengers took cruise vacations for two consecutive nights or more in 2002.").

[11] International Counsel on Cruise Lines, *The Cruise Industry 2003 Economic Summary*, at http://www.iccl.org/resources/2003_econstudy-analysis.pdf (last visited Dec. 2, 2004).

[12] According to the U.S. Department of Transportation's Maritime Administration, the three largest cruise companies, sailing under a number of "brand names," carried over 90 percent of all passengers who took cruises from North America in 2003. *See* U.S. Maritime Adm., Press Release, Market Share Statistics (Feb. 13, 2004), available at http://www.marad.dot.gov/Marad_statistics/PRESS%20RELEASE%20-%20Statistics/Market-Share-03.htm (last visited Dec. 15, 2004). Approximately 94 percent of all North American cruise departures in 2003 sailed

$25.4 billion to the United States economy in 2003, up 11 percent from 2002.[13] During 2003, cruise ships carried an estimated 9.8 million passengers worldwide, and of those, 76 percent, or 7.5 million, were U.S. residents. *Id.*

What is more, the U.S. market for cruises is growing rapidly. The popularity of cruising has grown significantly in recent years as lines seek to expand capacity by adding new ships and more berths.[14] The industry is projecting double-digit growth for the foreseeable future.[15] Cruise lines expect

out of American ports. *See id.*, available at http://www.marad.dot.gov/Marad_statistics/PRESS%20RELEASE%20%20Statistics/Top%2020%20Departure%20Ports-03.htm (last visited Dec. 2, 2004)(Vancouver, Canada, accounted for 5.6 percent of North American departures in 2003). These three major players, in order of size, are Carnival Corporation (which consists of twelve cruise lines, including Carnival Cruise, Holland America, Windstar, Seabourn, and Princess); Royal Caribbean Cruises Limited (which includes Royal Caribbean International and Celebrity Cruises); and Star Cruises (which includes Respondent Norwegian Cruise Line, Ltd. ("NCL"), Star Cruises, and Orient Line). *See* Royal Caribbean Cruises Ltd., SEC Form 20-F Annual Report (Dec. 31, 2003) at 5, available at http://sec.freeedgar.com/displayHTML.asp?ID=2832825 (last visited Dec. 2, 2004) (hereafter "Royal Caribbean 2003 20-F")(the second largest cruise line company is Royal Caribbean Cruises, Ltd., (incorporated as a Liberian company) with 28 ships); *see also* Star Cruise Lines, *Development of Star Cruises* at http://www.starcruises.com/About/index.html (last visited Dec. 2, 2004) (Star Cruises is the third largest cruise line in the world presently operating a combined fleet of 18 ships with over 29,000 lower berths).

[13] *The Cruise Industry 2003 Economic Summary, supra* note 11.

[14] Carnival 2003 10-K at 14, available at http://sec.freedgar.com/displayText.asp?ID=2789703 (last visited on Dec. 2, 2004). Since 1970, cruising has been one of the fastest growing sectors of the vacation market, as the number of North American passengers has grown to an estimated 8.2 million in 2003 from 0.5 million in 1970, a compound annual growth rate of approximately 9%. *Id.*

[15] Kinsman, *The Booming Cruise Industry Wants to Set a Course for San Diego, But Port Upgrades Might be Necessary, (*Mar. 28, 2004), available at http://www.signonsandiego.com/news/business/20040328-

to continue their increases in embarkations out of United States ports, and are making substantial investments in line with those expectations.[16] For instance, Holland America Lines, one of twelve branded lines owned by Carnival Corporation, is currently spending $225 million to upgrade its fleet.[17] In 2004, Holland America Line's fleet of thirteen ships will have offered nearly five hundred sailings from numerous United States home ports, including new departures from Norfolk, Virginia, Baltimore, Maryland, and Boston, Massachusetts.[18]

The U.S. passengers for this expanding industry are lured with images of dream vacations, complete accommodations, media entertainment, live shows, games, massages, and other attractions. For example, Respondent advertises that its "*Freestyle Vacation* cruise offers diverse and exciting restau-

9999-news_mz1b28tide.html (last visited on Dec. 2, 2004). "While the cruise market is growing, there are a lot of people who haven't taken a cruise trip because they are not near a port. While cities such as New Orleans, Gulfport, Miss., and Galveston, Texas, have been growing as cruise originators, other cities such as Jacksonville, Fla., Norfolk, Va., and Bayonne, N.J., are trying to get a foothold in the market."). *Id.*

[16] The number of cruise vessels operating is also growing. There are over 31 new large cruise ships under construction worldwide that are due for delivery between now and 2005. About 50 percent of those new vessels will be operating out of the United States. *See* California Cruise Ship Environmental Task Force, *Report to the Legislature*, at 9 (Aug. 2003), available at http://www.swrcb.ca.gov/legislative/docs/cruiseshipleg rpt.pdf (last visited Dec. 2, 2004).

[17] *See* PRNewswire, *Holland America Line's Launching Advertising Campaign*, (Feb. 14, 2004), available at http://www.prnewswire.com/ cgibin/stories.pl?ACCT=104&STORY=/www/story/02-17-2004/0002111 447&EDATE (last visited Dec. 2, 2004).

[18] *Id.* Holland America Line's $225 million investment in its "Signature of Excellence" initiative will focus on five areas, including "spacious, elegant ships." Carnival 2003 10-K at 10. Enhancements and construction build-outs have begun and are expected to be substantially completed by the end of 2005. *Id.*

rants, a more relaxed dress code and more things to see and do" and "[w]hether it's lazy days and romantic nights or an action-packed week of adventure, there's no better way to have the vacation of your dreams than with Freestyle Cruising and NCL,"[19] and "[a]ll of NCL's ships offer Broadway style theaters, 24-hour fitness centers, world-class spas, Internet Cafés and most offer dazzling casinos with the newest slots and table games afloat."[20] These images appeal strongly to Americans with disabilities because of the one-location nature of the complete accommodations and the lure of full participation in the best that life has to offer. The foreign flag of a ship is not an adequate excuse to ignore the ADA's Title III requirements when offering all Americans such perfection in accommodations and travel.

2. *Major Cruise Lines Maintain Principal Offices and Substantial Facilities and Personnel In the United States.*

Respondent reportedly has corporate headquarters or a principal place of business in Miami, Florida.[21] NCL Corporation, Ltd., ("NCL Ltd.") a recently formed entity also headquartered in Miami, Florida, oversees the North American operations of NCL (the Respondent), NCL America, and Orient Lines.[22] It also maintains an office in

[19] NCL Freestyle, at http://www.ncl.com/freestyle/index.htm (last visited Dec. 2, 2004).

[20] NCL Fleet, at http://www.ncl.com/fleet/index.htm (last visited Dec. 2, 2004).

[21] Star Cruise Lines Investor Releases, available at http://www. starcruises.com/Investor/Releases/2003/Ar/ar2003.pdf (identifying NCL Headquarters in Miami).

[22] NCL News, *NCL Purchases Hawaii Tour Bus Co.*, NCL News at http://www. ncl.com/news/pr/pr111704.htm (last visited Dec. 2, 2004). *See also id., Major Corporate Financing Completed by NCL Corporation, Ltd.* at http://www.ncl.com/news/pr/pr071604.htm (last visited Dec. 2, 2004).

Honolulu, Hawaii.[23] NCL Ltd. reportedly employs approximately 1,200 personnel in the United States.[24] It. also operates a "Customer Service Center" at the Waikiki Beach Marriott Resort and Spa in Honolulu.[25]

On July 4, 2004, NCL Ltd. introduced the re-flagged *Pride of Aloha*, the first modern U.S.-flagged cruise ship in nearly 50 years.[26] The 2,002 passenger ship is 100% U.S.-crewed, and sails year-round in Hawaii under the NCL America brand alongside *Norwegian Wind* from sister brand, Norwegian Cruise Line.[27] NCL Ltd. is currently building three ships that will be U.S.-flagged, including two more for the NCL America brand in Hawaii - *Pride of America* (delivery in June, 2005) and *Pride of Hawaii* (delivery in April 2006). Norwegian Jewel will join the Norwegian Cruise Line fleet in August 2005.[28]

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[23] *See* Pacific Business News, Offices on the Move, Vacancies on the Decline, (Sep. 23, 2003) at http://www.bizjournals.com/pacific/stories/2003/09/22/daily38.html (last visited Dec. 2, 2004).

[24] Dun & Bradstreet Report on NCL (Nov. 29, 2004).

[25] Cruise Lines, U.S., *Norwegian Cruise Line Introduces Customer Service Center in Honolulu for Hawaii Cruise Travelers*, at http://www.cruiselines.us/cruiseline_norwegian_news_06302004.html (last visited Dec. 2, 2004). NCL offers a full concierge service exclusively available for guests, an array of offerings for its Hawaii travelers including pre-cruise check-in, land and shore excursion coordination, advance spa and dining reservations and cabin upgrade requests. It also offers pre- and post-cruise land packages at the Waikiki Beach Marriott Resort and Spa and other Honolulu hotels.

[26] NCL News, *NCL Purchases Hawaii Tour Bus Co.*, at http://www.ncl.com/news/pr/pr111704.htm (last visited Dec. 2, 2004).

[27] *Id.*

[28] *Id. See also* NCL News, *Norwegian Cruise Line Announces Deployment for 2005-06* (April 19, 2004) at http://www.cruiselines.us/cruiseline_norwegian_news_04192004.html (last visited Dec. 2, 2004).

NCL Ltd. has other substantial U.S. operations keyed to its cruises. Recently, it acquired a local Hawaiian tour bus company, Polynesian Adventure Tours, for $5 million.[29] The company operates approximately 100 motor coaches and buses on all four major Hawaiian Islands, and. has stated that it intends to retain its 200 employees and continue the tours.[30] According to NCL's Executive Vice President, NCL plans to bring 500,000 cruise passengers to Hawaii by next year and will be "poised to invest the necessary resources in Polynesian Adventure tours to meet the needs of our cruise business as well as service the company's existing customer base."[31]

NCL is not the only large cruise line that is literally present in the U.S. and doing business with Americans here. Its competitors also have significant domestic operations. Virtually every major cruise line has offices in the United States, and several have located their headquarters and substantial operations in the U.S. as well.[32] For example, Carnival Corporation, the largest cruise company in the world based on passengers carried, revenues generated and available capacity, has numerous business units, as well as personnel and real and personal properties scattered throughout the

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[29] NCL News, *NCL Purchases Hawaii Tour Bus Co.*, at http://www.ncl.com/news/pr/pr111704.htm (last visited Dec. 2, 2004). *See also* Pacific Business News (Honolulu), *NCL Buys Tour Bus Company* (Nov. 17, 2004), available at http://pacific.bizjournals.com/pacific/stories/2004/11/15/daily30.html (last visited Dec. 2, 2004).

[30] *Id.*

[31] *Id.*

[32] *See* Sun Sentinel, *Cruise Line Addresses* (Sep, 7, 2003) available at http://www.sun-sentinel.com/travel/custom/cruises/sfl-2003fallcruzaddsep07%2C0%2C6993190.story (last visited Dec. 2, 2004)(listing cruise line addresses).

United States.[33] The Port of Miami, Florida alone is the homeport to Carnival Cruise Lines, Royal Caribbean International, and Respondent, handling 18 cruise ships and nearly 4 million passengers in 2003.[34]

Carnival owns twelve cruise brands, including Carnival Cruise Lines, Holland America Line, Princess Cruises, Seabourn Cruise Line and Windstar Cruises, all of which operate in North America.[35] In 2003, Carnival employed approximately 8,500 full-time and 2,500 part-time/seasonal employees in shore side operations.[36] Its principal shore-side operations, and the parent company's corporate headquarters, are located in a 456,000 square foot facility that it owns in Miami, Florida.[37] Carnival's subsidiaries Holland America Line, Windstar and Princess Tours lease 179,000 square feet of space in Seattle, Washington for their headquarters operations, and Princess Cruises leases 282,000 square feet of space in Santa Clarita, California.[38] Carnival also leases office space in Colorado Springs, Colorado and Miramar, Florida for an additional reservation center and for additional personnel, respectively.[39] Office space is also leased in Hollywood, Florida for Costa's South Florida sales office and in Pompano Beach, Florida for certain of Princess' art framing and warehousing operations.[40]

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[33] Carnival 2003 10-K at 21, available at http://sec.freeed-gar.com/displayText.asp?ID=2789703 (last visited Dec. 2, 2004).

[34] Port of Miami, Florida, *Cruise Facts*, at http://www.co.miami-dade.fl.us/portofmiami/cruise_facts.asp (last visited Dec. 2, 2004).

[35] Carnival 2003 10-K at 2, available at http://sec.freeedgar.com/displayText.asp?ID=2789703 (last visited Dec. 2, 2004).

[36] *Id.* at 21.

[37] *Id.* at 27.

[38] *Id.*

[39] *Id.*

[40] *Id.*

Royal Caribbean Ltd. has its principal executive office and shore-side operations at the Port of Miami, Florida, where it leases three office buildings totaling approximately 359,000 square feet from Miami-Dade County under long-term leases.[41] Royal Caribbean also leases an office building in Wichita, Kansas totaling approximately 89,000 square feet which is used primarily as an additional reservation center, and leases an office building in Miramar, Florida totaling approximately 128,000 square feet.[42]

In addition to cruise ships, tour operations, particularly in Alaska, have become a domain of cruise lines. Cruise lines increasingly are the owners of buses, railcars, and end-point resorts, controlling much of the shore-side vacation activity for cruise participants. For example, Carnival Corporation operates two tour companies under the brand names Holland America Tours and Princess Tours.[43] These tour companies are the leading cruise/tour operators in the State of Alaska and, as of the end of 2003, marketed and operated substantial facilities and services, stretching the reach of their cruises to Alaskan, interior Washington, and the Canadian Yukon destinations. These include: 17 hotels or lodges, with approximately 2,714 guest rooms, over 500 motor coaches used for sightseeing, over 20 domed rail cars, two luxury day boats that tour glaciers and sightseeing packages sold as part of cruise/tour packages.[44]

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[41] Royal Caribbean Ltd. SEC Form 20-F (2003) at 17, available at http://sec.freeedgar.com/displayHTML.asp?ID=2832825 (last visited Dec. 2, 2004)

[42] *Id.*

[43] Carnival 2003 10-K at 3.

[44] *Id.* In addition to cruises, all of Carnival's cruise brands sell pre- and post-cruise land packages in conjunction with ports of call in the U.S., which generally include stays at nearby attractions or other vacation destinations, or individual/multiple city tours of Boston, Massachusetts, New York City, Washington, D.C. and/or Las Vegas, Nevada, and pre-

The core of the global cruise industry is focused on the U.S. customer base and is present in the U.S. for substantial and continuous operations, supporting its foreign-flagged cruise ship business.

3. *Cruise Lines Affirmatively Advertise and Market Cruises in the United States to Attract American Passengers.*

Cruise lines are pouring record amounts of money into advertising. For example, Royal Caribbean Cruise Ltd. incurred over half a billion dollars in selling and administrative expenses in 2003, up nearly twenty percent from the previous year.[45] Carnival Corporation spent even more.[46]

Major cruise lines portray that they have everything for everyone. They develop and promote seductive, multi-million dollar advertising campaigns designed to attract American passengers. For instance, Holland America's

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and post-cruise land packages, utilizing, to a large extent, its transportation and hotel assets. *Id.* at 17.

[45] *See* Royal Caribbean 2003 Form 20-F at 25, available at http://sec.freeedgar.com/displayHTML.asp?ID=2832825 (last viewed Dec. 2, 2004) ("Marketing, selling and administrative expenses increased 19.3% to $514.3 million in 2003 compared to $431.1 million in 2002. The increase in 2003 was primarily attributable to new initiatives associated with the Celebrity Cruises marketing campaign and a return to more normalized spending levels. The year 2002 reflected lower spending levels as a result of business decisions taken subsequent to the events of September 11, 2001. Marketing, selling and administrative expenses as a percentage of total revenues were 13.6% and 12.6% in 2003 and 2002, respectively. On a per Available Passenger Cruise Day basis, marketing, selling and administrative expenses in 2003 increased 6.4% from 2002.").

[46] Carnival 2003 10-K at 77, available at http://sec.freeedgar.com/displayText.asp?ID=2789703 (last visited Dec. 2, 2004) ("Cruise selling and administrative expenses increased $319 million, or 55.3%, to $896 million in 2003 from $577 million in 2002.").

newest ad campaign, produced by U.S. firm DDB Seattle, centers around "five brand pillars that are central to the guests' experience: spacious, elegant ships and accommodations; sophisticated, five-star dining; gracious, unobtrusive service; extensive enrichment programs and activities; and compelling worldwide itineraries."[47] Respondent touts that it was the first cruise line to offer a nationwide air/sea program combining cruise, hotel and transfers from more than 150 U.S. and Canadian cities.[48]

Major cruise lines have a large sales force based in the United States, branded according to their lines, that focuses on assisting independent travel agencies in the U.S. to grow and develop their cruising businesses.[49] For example, even as of 1999, Carnival Corporation employed over 350 personnel, excluding reservation agents, in the sales and sales support area.[50] Such employees, among other things, focus on motivating, training and supporting the retail travel agent community, which sells substantially all of the company's cruises.[51]

Cruise line sales personnel provide cooperative marketing support to U.S. travel agencies. For instance, also in 1999, Carnival employed approximately 120 business development managers and 50 in-house service representatives to motivate

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[47] See PRNewswire, *Consumer Publications See Ad Campaign as an Innovative Glimpse into Holland America Line's Tradition of Excellence* (Feb. 17, 2004) available at http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-17-2004/0002111447&EDATE=.

[48] *See* NCL News at http://www.ncl.com/news/downloads/NCLOverview_July04_092204.pdf.

[49] *See* Royal Caribbean Form 20-F at 11, at http://sec.freeedgar.com/displayHTML.asp?ID=2832825 (last viewed Dec. 2, 2004).

[50] *See* Carnival Corporation SEC Form 10-K (Nov. 30, 1999), "Sales and Marketing" (non-paginated electronic document) at http://sec.freeedgar.com/displayText.asp?ID=1180792 (last visited Dec. 2, 2004).

[51] *Id.*

independent travel agents and to promote its cruises as an alternative to land-based vacations or other cruise lines.[52] Carnival also employed approximately 750 reservation agents in 1999 to take bookings from independent travel agents.[53]

Carnival's competitor, Royal Caribbean, offers an automated reservations system that provides travel agents direct access to its computer reservation system for bookings with its brands, employs customer service representatives, and operates reservation call centers in Miami, Florida and Wichita, Kansas.[54]

4. *Cruise Lines Rely Upon Public Funds to Improve U.S. Ports to Better Accommodate their Vessels.*

While a foreign-flagged ship with an American port as its "home port" may have a foreign crew, be foreign owned, and be foreign built,[55] it enjoys the same benefits and privileges in the port and in U.S. waters as an American-flagged ship built in the United States with an American crew.[56] Significantly,

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[52] *Id.* at "Sales and Marketing"—"Carnival."

[53] *Id.*

[54] Royal Caribbean Form 20-F, *supra* note 30, at 11.

[55] A major reason not to fly the American flag is to avoid U.S. corporate income tax. The countries of registry of virtually all foreign-flagged vessels do not tax the revenue earned from ships engaged in either the carriage of goods or passengers. Martin, *Flags of Convenience*, CBC News Online (Feb. 6, 2004) at http//www.cbc.ca/news/background/martin-paul/flags of convenience.html.(last visited Dec. 2, 2004).

[56] *Vessel Operations Under Flags of Convenience and Their Implications on National Security*: Hearing Before the Special Oversight Panel on the Merchant Marine, House Comm. on Armed Services, 107th Cong. 2d Sess. 14 (2002) (Hereafter "Merchant Marine Hearing) (Testimony of Rear Admiral Paul J. Pluta, Assistant Commander for Marine Safety and Environmental Protection, United States Coast Guard).

all of the major cruise lines' vessels that operate out of ports in the continental U.S. are foreign-flagged.[57] Those ships are served by the U.S. Coast Guard; they use port facilities built, and channels dredged, at U.S. taxpayers' expense; and they have access to local police and fire protection, while their owners pay little or no U.S. taxes.[58]

Cruise lines have gained significant attention from U.S. port authorities eager to build new facilities in order to attract and retain their cruisee businesses. That influence includes accessing tax revenues to fund port improvements and security, many times specifically tailored to the cruise lines' needs. For instance, Royal Caribbean has reached an agreement with Miami-Dade County for $16 million in improvements on its terminals to make room for a third ship of its largest class.[59] The county, which governs and owns the Port of Miami, has agreed to reimburse Royal Caribbean

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[57] In fact, Respondent currently has the only U.S.-flagged cruise ship, which operates out of Hawaii. *See* http://www.ncl.com/news/pr/pr111704.htm (last visited Dec. 2, 2004). All other cruise ships it uses in the U.S. are foreign-flagged. *Id.*

[58] *Merchant Marine Hearing*, *supra* note 58, at 45.

[59] Miami Today, *County to Repay Royal Caribbean For $16 Million Upgrade at Port* (Feb. 7, 2002), available at http://www.floridacdc.org/infofax/020211.htm (last visited on November 15, 2004) ("In return, company officials said, the county's investment should generate $1.4 million in additional annual revenues for the port from dock, wharf and parking fees. The cruise line will be reimbursed up to $16 million under terms similar to those used in 1998 when the port expanded terminals 3, 4 and 5. Then, he said, it was Royal Caribbean that financed the renovations for about $76 million and the county reimbursed the line from port revenues."). The port has recently received $425,000 in federal funds for security programs. *See* http://www.co.miami-dade.fl.us/portofmiami/press_releases/04-09-14-security.asp (last visited Dec. 2, 2004). Total federal grants, over the course of 10 grants, total $17,652,850; five of these grants were for cruise security improvements. *Id.*

for its costs as work progresses.[60] The City of Norfolk, Virginia is moving forward on funding and construction of a new $36 million cruise terminal and $5 million in associated infrastructure by the end of 2006.[61] The State of New Jersey has invested $42 million into a new cruise port, which opened in May at Bayonne.[62] Interested citizens of Baltimore have call upon Maryland's governor to follow suit.[63] As part of a larger "Master Plan" being developed to accommodate the growing cruise industry in New York City, the City will invest $50 million in facility upgrades the NYC Passenger Ship Terminal to help the cruise industry meet growing demand.[64] The proposed upgrades are to improve passenger circulation, reduce roadway congestion, stabilize the facility infrastructure and improve passenger service and comfort.[65]

Cruise lines work in cooperation with U.S. port authorities in developing and financing cruise port facilities in the U.S. For instance Carnival states:

> [I]n cooperation with private or public entities, we are engaged in the development of new or enhanced cruise port facilities. Our involvement typically includes providing cruise port facility development and management expertise and assistance with financing. During 2003, we were primarily involved in the development of

[60] *Id.*

[61] Letter from various individuals in Maryland business and travel communities calling upon Maryland Governor Ehrlich (Aug. 30, 2001) to support a new cruise terminal and better customer facilities in Baltimore, at http://www.aaamidatlantic.com/safety/release_content.asp?id=1659 (last visited Dec. 2, 2004).

[62] *Id.*

[63] *Id.*

[64] *See* New York Post, *What's News -- NYC Economic Development Corporation Announces Improvements for Passenger Ship Terminal* (Jan. 15, 2004) at http://www.nypst.com (last visited Dec. 2, 2004).

[65] *Id.*

> cruise port facilities in Long Beach, California and Savona, Italy, which opened in 2003, Galveston, Texas, and San Juan, Puerto Rico. In addition, we are in the process of negotiating for the development of several other port facilities to service our North American and European guests, including, but not limited to, facilities in Barcelona, Spain, Brooklyn, New York and the Turks & Caicos Islands.[66]

Royal Caribbean states, "In an effort to secure satisfactory berthing facilities for our ships, and to provide new or enhanced cruise destinations for our passengers, from time to time we assist or invest in the development or enhancement of certain port facilities and infrastructure located in strategically important ports of call. Generally, we collaborate with local private or governmental entities by providing management and/or financial assistance. In exchange for our involvement, we generally secure preferential berthing rights for our ships."[67]

The Port of Seattle started a $12.9 million terminal build-out after it entered an agreement with NCL to use the Port as its "homeport" for NCL's foreign-flagged Alaska cruises for at least four years.[68] The build-out included features that the Port made to attract cruise lines such as a mechanical, covered passenger bridge, ticketing centers, escalators, a weather canopy, a large and efficient baggage claim area, and Customs and Immigration inspection stations.[69]

[66] Carnival 2003 10-K at 16, available at http://sec.freeedgar.com/displayText.asp?ID=2789703 (last visited on Nov. 30, 2004).

[67] Royal Caribbean 20-K at 10.

[68] *See* NCL, *Countdown to Norwegian Cruise Line's First Homeport Season* (May 7, 1999), available at http//www.ncl.com/news/pr/pr990507a.html (last visited Dec. 2, 2004).

[69] *Id.*

Funding sources for port cruise passenger facility improvements can come from local bonds and county and city tax dollars.[70]

C. Consideration of the Multitude of Cruise Lines' Continuous Contacts With The U.S. Strongly Favors Enforcing Title III of the ADA Against Their Foreign-Flagged Cruise Ships.

Consistent with *Rhoditis*[71] and *Lauritzen*[72], the foreign registry of cruise ships and even a cruise line's foreign incorporation are not sufficient to overcome the effect of the multitude of the cruise industry's substantial and continuous contacts with the U.S. Cruise lines and the cruise ships they run under foreign flags purposefully take full advantage of doing business in the U.S.; indeed, using the language of *Rhoditis*, they have a U.S. "base of operations," and their ship is "not a casual visitor; rather it and many of its sister ships [are] earning income from 'cargo' (i.e. American passengers) originating or terminating here."[73] Like most other cruise

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[70] *See, e.g.,* Broward County Capital Budget, Passenger Facilities/Port Building – Improvements, Funding Summary at http://www.co.broward.fl.us/budget/obi02485.pdf (last visited Dec. 2, 2004). *See also* news from the Port of Galveston at http://www.portofgalveston.com/news/publications/supplements/2002June/Message%20from%20the%20Pt%20Dir.pdf. (last visited Dec. 2, 2004) ("Port staff realizes the need to find new strategies to secure funding for the development of port facilities for future growth. The staff looked to the Galveston City Council to create a financing arm to fund new developments and improvements. The City Council authorized the formation of a Local Government Corporation (LGC) to issue bonds based on guaranteed revenues to include guaranteed leases and minimal revenue streams from future business."). Two of Respondent's cruise ships that are at issue in this case sailed out of the Port of Galveston.

[71] 398 U.S. 306 (1970).

[72] 345 U.S. 571 (1953).

[73] 398 U.S. at 310.

lines, the Respondent has substantial and continuing contacts with the U.S. Moreover, the nature and purpose of its contacts are directly related to the wrong alleged here. The cruise lines seek out Americans, including those with disabilities, as customers to engage in activities that are squarely at the center of the purpose of Title III of the ADA.

II. AS SHOWN BY JUDICIAL DECISIONS AND CONSENT SETTLEMENTS, FOREIGN-FLAGGED SHIPS AND CRUISE LINES OPERATING IN THE UNITED STATES MUST COMPLY WITH OTHER GENERAL STATUTES, AND FIND IT FEASIBLE TO COMPLY WITH THE ADA.

Judicial decisions under other general commercial and civil rights statutes demonstrate that operation of foreign-flagged ships having substantial contact with the U.S. must comply with such laws. Consent decrees entered into by cruise lines regarding their foreign-flagged ships further demonstrate that it is feasible for cruise lines to change their ships and practices to comply with the ADA.

(1) Foreign companies are not exempt from complying with U.S. laws merely because of their foreign status.[74] Cruise lines having foreign-flagged vessels are no different. With operations in the U.S. or off its coast, they have been required to comply with various general commercial and civil rights statutes.[75] These include laws as to which there was no

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[74] *See, e.g., Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (foreign companies are subject to state and federal laws for conduct in the United States).

[75] *See, e.g., EEOC v. Kloster Cruise Ltd.*, 897 F. Supp. 1422 (S.D. Fla. 1995) (examining whether foreign-flagged cruise ship line violated the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* when it terminated several older, shoreside salespersons); *Latman v. Costa Cruise Lines N.V.*, 758 So. 2d 699 (Fla. Dist. Ct. App. 2000), *cert. denied*, 537

legislative statement of a specific Congressional intent regarding foreign-flagged cruise ships specifically.[76]

(2) In several suits seeking ADA compliance by foreign-flagged cruise ships, the defendant cruise lines have settled the case with agreements to make ADA-based modifications and policy changes. These consents show the feasibility, without unreasonable burden, of retrofitting existing cruise ships to make them more accessible to people with disabilities.

For example, in *Access Now, Inc. v. Costa Crociere, S.P.A.*,[77] plaintiff alleged that the defendant cruise lines violated the ADA by failing to make cruise ships accessible. Costa, in settling that case, agreed to make certain modifications to four of its ships, with an option to include

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U.S. 884 (2002) (subjecting cruise lines, including Kloster Cruise Lines, d/b/a Norwegian Cruise Lines, to Florida's Deceptive and Unfair Trade Practices Act because of the cruise lines' pricing policies); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. Dist. Ct. App. 1999) (affirming class certification in a suit alleging deceptive trade practices based on the cruise line's pricing policies); *Premier Cruise Lines, Ltd. v. Picaut*, 746 So. 2d 1132 (Fla. Dist. Ct. App. 1999) (reversing summary judgment for defendant and allowing further discovery in plaintiff's state law fraudulent and false advertising claim against a cruise line); *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Hawaii. 1999) (finding some ADA claims applicable to cruise ships).

[76] *See* note 75, *supra*. Respondents' assertion that the statute or legislative history must specifically mention foreign-flagged cruise ships reduces the issue to a logical absurdity. There is no general requirement that a statute or the congressional report must call out every class and category of business that may be subject to a statute. Were that the case, Congress would be so preoccupied with writing out every detail of its intended statutory measures that there would be little time for actual legislation.

[77] *Access Now, Inc. v. Costa Crociere, S.P.A.*, No. 00-7231-CIV (S.D. Fla. 2000).

other ships.[78] In the settlement agreement entered in *Access Now, Inc. v. Cunard Line, Ltd.*,[79] Cunard/Carnival agreed to spend $7 million on installing fully and partially accessible cabins, accessible public restrooms, new signage, coamings, thresholds, stairs, corridors, doorways, restaurant facilities, lounges, spas and other shipboard facilities, including elevator accessibility.[80] The scope of the agreement covered fifteen existing ships and seven ships under construction, and ships ordered in the future.[81]

Indeed, the industry has shown that new cruise ships can be designed to greatly expand accessibility to persons with disabilities. For example, Royal Caribbean International's *Mariner of the Seas*, launched in November 2003, is touted as the first cruise ship that can be fully experienced firsthand by guests with disabilities. The ship does not contain many of the bulkhead barriers found in most other cruise ships that block access to bathrooms, dining rooms, and other entertainment areas. It also provides wheelchair access to balconies, with accessible cabins having extra wide doorways

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[78] *See* Carnival 2003 10-K at 20, available at http://sec.freeedgar.com/displayText.asp?ID= 2789703 (last visited Dec. 2, 2004).

[79] *See Access Now, Inc., v. Cunard Line, Ltd.*, No. 00-7233-CIV (S.D. Fla. 2001).

[80] Cruise Line Law Reporter, *Class Action Under the Americans With Disabilities Act Against Two Major Cruise Lines Settled Requiring the Cruise Lines to Make Major Shipboard Modifications—Settlement Approved by Court* (Oct. 2001), available at http://www.lipcon.com/cllr_oct_01.shtml#2 (last visited Dec. 2, 2004).

[81] *Id.* (discussing Joint Motion for Conditional Class Certification, Fairness Hearing, a Stay and Approval of Settlement, § 2.1 Modification to Ships and Policies, at 7); *see also* U.S. Department of Justice, Civil Rights Division, *Enforcing the ADA, A Status Report from the Department of Justice*, July-September 2001, Issue 3, Section 3 (Title III) at http://www.usdoj.gov/crt/ada/julsep01.htm (last visited Dec. 2, 2004).

that permit wheeling onto cabin balconies.[82] No artificial exemption created by "the façade of the operation" of foreign-flagged vessels should be erected to forestall this kind of innovation in cruising, an industry that substantially and continuously serves American customers from the U.S.[83]

A consent decree agreed to by Respondent itself demonstrates the feasibility of also ending cruise business and pricing practices that discriminate against persons with disabilities. In *United States v. Norwegian Cruise Lines, Ltd.*,[84] a Title III case involving persons with visual impairments,[85] NCL agreed to (a) not request or require any

[82] Free-Pree-Release.com News, Inspection Reveals the Most Handicap Accessible Ship Ever, at http://www.free-press-release.com/news/200403/1080155981.html (last visited Dec. 2, 2004). Some cruise lines now offer accommodations such as special health services, including kidney dialysis, oxygen tanks, and special menus for diabetics. *See* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/otherNeeds.do;jsessionid=00006 ja_zNN_qJnXNfpcWPdQqwO:v2mocbr0 (last visited Dec. 2, 2004).

[83] Royal Caribbean has announced that it has "begun a multi million-dollar access project to upgrade and add to our offerings over the next three years." *See* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/home.do;jsessionid=00006ja_zNN_qJnXNfpcWPdQqwO:v2mocbr0?cS=NAVBAR (last visited Dec. 2, 2004). Some of the features touted for persons with mobility impairments are: "early boarding, cruise transfers utilizing a specialized van with lift, boarding and departure assistance, scooter access, hydraulic lifts for one pool and one Jacuzzi on each ship in the fleet, accessible tender system, accessible Blackjack tables in the casino, accessible Guest Relations Desk, and deck plans that show accessible paths of travel." *Id.*, at http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=00006ja_zNN_qJnXNfpcWPdQqwO:v2mocbr0 (last visited Dec. 2, 2004).

[84] No. 01-0244 (S.D. Fla. 2001).

[85] *See* Department of Justice News Release: *Norwegian Cruise Line Agrees With Justice Department to Keep its Ships Open to Blind Persons* (2001), available at http://www.usdoj.gov/opa/pr/2001/September/456cr.htm (last visited Dec. 2, 2004); *see also* Consent Order and Final

person with a visual impairment to travel with, or share a cabin with, a sighted companion; (b) not request or require any person with a visual impairment to obtain a medical note prior to traveling; (c) not request or require any person with a visual impairment to assume liability for risks associated with traveling on a cruise ship, unless such request or requirement is made to all persons; (d) designate an employee to deal with and address all matters related to the ADA; and (e) implement ADA training for Norwegian employees.[86]

Any objection based on the burden to retrofit or design ships for ADA-compliance was foreclosed by Congress in language that requires changes that are "readily achievable."[87] The agreement by cruise lines in settlements and consent orders further removes any burden argument. The cruise companies are here, active, and heavily invested in the U.S. What remains is revealed in the briefs filed with the Petition for Certiorari in this case: Respondent and its *amici* seek, more than anything else, the certainty of knowing whether the ADA applies. Certainty and uniformity among Circuits is of prime consideration; burdensomeness is not.

The ADA broadly applies to end discrimination against Americans with disabilities in all aspects of their social and business interactions, and the impediment erected by the Court of Appeals' decision below should be uprooted so that both certainty and progress will prevail.

Judgment, available at http://www.usdoj.gov/crt/ada/ncruise.htm (last visited Dec. 2, 2004).

[86] *United States v. Norwegian Cruise Line, Ltd.*, *supra* note 84.

[87] 42 U.S.C. § 12182(b)(2)(A)(iv). "The term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense." *Id.* at § 12181(9) (listing the factors to be considered).

CONCLUSION

For the foregoing reasons, *amici* urge that the decision of the Court of Appeals for the Fifth Circuit be reversed, and remanded for full proceedings applying Title III to the merits of Petitioners' claims.

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APPENDIX

APPENDIX

AMICI CURIAE

AARP
Alexander Graham Bell Association for the Deaf and Hard of Hearing
American Diabetes Association
Association on Higher Education And Disability
Depression and Bipolar Support Alliance
Disability Rights Education and Defense Fund, Inc.
Judge David L. Bazelon Center for Mental Health Law
National Association of Councils on Developmental Disabilities
National Association of the Deaf

THE *AMICI* ORGANIZATIONS

AARP is a nonpartisan, nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title III of the ADA to assure access to all manner of public accommodations in a manner free from discrimination. Numerous AARP members, many of whom are persons with disabilities, partake of the dining, touring, recreation, entertainment, educational and other services which are available on cruise ships serving U.S. ports or which are provided in connection with cruises undertaken by such ships. In addition, AARP vigorously supports access to travel opportunities for its members, including those provided on or associated with cruise ships serving U.S. ports. Thus, AARP has a strong interest in assuring that Title III of the ADA is interpreted properly, so as to assure full and unimpeded access to cruise line services by its members and other persons with disabilities. The protections of Title III of the ADA are especially important to AARP members because

older persons have a higher incidence of disabilities than other populations.

The Alexander Graham Bell Association for the Deaf and Hard of Hearing ("AG Bell") is a non-profit organization based in Washington D.C. AG Bell has chapters throughout the United States, and has international affiliates throughout the world. AG Bell advocates for spoken language in children and adults. AG Bell is deemed to be the preeminent organization in deafness. AG Bell provides advocacy, resources and leadership for parents, professionals, and individuals who are deaf or hard of hearing. AG Bell has participated as amicus curiae in numerous court cases that potentially affect the legal rights of its members.

The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes research, information and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, the American Diabetes Association advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. The American Diabetes Association has over 400,000 general members and over 17,000 health care professional members.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher educa-

tion and in high-stakes standardization testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the ADA and Section 504 of the Rehabilitation Act of 1973 by post-secondary institutions.

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Depression and Bipolar Support Alliance ("DBSA") is the leading patient-directed national organization focusing on the most prevalent mental illnesses—depression and bipolar disorder. Studies indicate that there may be 20 to 35 million persons with depression and 2.5 million to 10 million people with bipolar disorder. DBSA was founded in 1985 and is based in Chicago. DBSA's mission is to improve the lives of people living with mood disorders. This not-for-profit organization fosters an environment of understanding about the impact and management of these life threatening illnesses by providing up-to-date, scientifically based tools and information, written in easy to understand language. DBSA has more than 1,000 peer-run support groups across the country. Assisted by a Scientific Advisory Board, comprised of the leading researchers and clinicians in the field of mood disorders, DBSA supports research to promote more timely diagnosis, to develop more effective and tolerable treatments and to discover a cure. The DBSA organization works to ensure that people living with mood disorders are treated equitably. In that regard, the DBSA believes that the

Americans With Disabilities Act should be given a strong, vigorous and broad construction.

The Disability Rights Education and Defense Fund, Inc. ("DREDF"), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote to full integration of citizens with disabilities into the American mainstream, DREDF has represented or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination. DREDF is nationally recognized for its expertise in the interpretation of disability civil rights laws.

The National Association of Councils on Developmental Disabilities ("NACDD") is a national, member-driven organization consisting of 55 State and Territorial Councils. NACDD places high value on meaningful participation and contribution by Council members and staff of all Member Councils, and we advocate and continually work towards positive system change on behalf of individuals with developmental disabilities and their families. NACDD was established in 2002 to bring together the two organizations that previously supported DD Councils, Consortium of Developmental Disabilities Councils and National Association of Developmental Disabilities Councils. NACDD represents the diverse interests of its Council members. It is the national voice of the Councils on Developmental Disabilities. Its purpose is

to support Councils in implementing the Developmental Disabilities Assistance and Bill of Rights Act and in promoting the interests and rights of people with developmental disabilities and their families.

The mission of the National Association of the Deaf ("NAD") is to promote, protect, and preserve the rights and quality of life of deaf and hard of hearing individuals in the United States of America. Established in 1880, the NAD is the nation's oldest and largest nonprofit organization safeguarding the accessibility and civil rights of 28 million deaf and hard of hearing Americans across a broad range of areas including captioning, communication, education, employment, health care, security, technology, telecommunications, and transportation. The NAD is committed to ensuring that deaf and hard of hearing Americans have equal access to and an equal opportunity to participate in and benefit from travel, entertainment, and other services marketed, owned, operated, and/or conducted in the United States of America and its territories. Removal of communication barriers by providing reasonable accommodations, including auxiliary aids and services, is necessary to ensure access by individuals with sensory disabilities.

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In The

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DOUGLAS SPECTOR, ET AL.,
Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE*
PARALYZED VETERANS OF AMERICA,
AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES,
THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,
EPILEPSY FOUNDATION, UNITED SPINAL ASSOCIATION,
UNITED CEREBRAL PALSY, THE ARC OF THE UNITED STATES,
AMERICAN COUNCIL OF THE BLIND, NATIONAL MULTIPLE
SCLEROSIS SOCIETY, AND THE TRAINING AND ADVOCACY
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INTRODUCTION

Paralyzed Veterans of America ("PVA"), American Association of People with Disabilities ("AAPD"), The Council of Parent Attorneys and Advocates, Inc. ("COPAA"), Epilepsy Foundation, United Spinal Association, United Cerebral Palsy ("UCP"), The Arc of the United States ("The Arc"), American Council of the Blind ("ACB"), National Multiple Sclerosis Society, and The Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems, Inc. ("TASC/NAPAS") respectfully submit this *amici curiae* brief in support of petitioners.[1]

INTEREST OF *AMICI*

Founded in 1946, the Paralyzed Veterans of America is a congressionally chartered veterans service organization with over 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its membership and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of PVA members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq*. PVA's Advocacy and Architecture Programs advocate for full access to the built environment, including marine vessels of all types. PVA frequently receives complaints from its members and

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[1] The parties in this case have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

others who suffer discrimination because they cannot gain access to cruise ships or because they do not have access to the full range of services and amenities available to others onboard.

The American Association of People with Disabilities has over 100,000 members and is the largest national non-profit cross-disability member organization in the United States. Dedicated to ensuring economic self-sufficiency and political empowerment for the more than 56 million children and adults with disabilities in the U.S., the AAPD works in coalition with other disability organizations for the full implementation and enforcement of disability nondiscrimination laws. It was founded in 1995 to help unite the diverse community of people with disabilities, including their families, friends, and supporters, and to be a national voice for change in implementing the goals of the ADA. AAPD's interest in this case arises from the organization's stated goal of furthering the productivity, independence, full citizenship, and total integration of people with disabilities into all aspects of society and the natural environment.

The Council of Parent Attorneys and Advocates, Inc. is a national nonprofit organization of attorneys, advocates and parents established to improve the quality and quantity of legal assistance for parents of children with disabilities. COPAA represents the interests of all students with disabilities. COPAA's interest in this case is two-fold: to ensure that laws vindicating the rights of persons with disabilities, including the ADA, are fully enforced; and to enhance the recreational, leisure, and community opportunities for children with disabilities as these activities in general benefit the broad educational experiences of children with disabilities.

The Epilepsy Foundation is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, the Epilepsy Foundation has, since its inception, worked to dispel the stigma associated with seizures, and has supported the development of laws, including the ADA, that protect individuals from discrimination based on these stereotypes and fears.

The United Spinal Association is a membership organization of persons with spinal cord dysfunction, injury, or disease, many of whom are persons with disabilities as defined by the ADA. The United Spinal Association furthers its members' interests by assuring quality healthcare, promoting research, advocating for civil rights and independence, and educating the public about these issues and enlisting their help to achieve these fundamental goals. The United Spinal Association has expanded its original mission of advocacy as a veterans organization and now provides its expertise to all individuals with a spinal cord injury or disease, regardless of their age, gender, or veteran status. The United Spinal Association has direct experience with travel services available to individuals with mobility impairments. In particular, the United Spinal Association advocates on behalf of travelers with disabilities who have confronted barriers during their trips and is just beginning to offer travel services to its members.

For more than 55 years, United Cerebral Palsy has been committed to change and progress for persons with disabilities. The national organization and its nationwide network of 99 affiliates in 36 states, and the District of Columbia, strive to ensure the inclusion of persons with disabilities in every facet of society — from the Web to the workplace, from the classroom to the community. As one of the largest health charities in America, UCP seeks to advance the inde-

pendence, productivity, and full citizenship of people with disabilities through an affiliate network.

The Arc of the United States, through its approximately 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related developmental disabilities and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation and related disabilities in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the ADA. The Arc is now actively involved in the law's implementation and enforcement.

The American Council of the Blind is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. ACB strives to increase the quality of life for all people who are blind and visually impaired by working to increase their independence, security, and equality of opportunity. ACB members were very involved in the efforts that led to the passage of the ADA, and ACB believes that exempting cruise ships from Title III of the ADA would undermine the basic principles of access and accommodation for people with disabilities that lie at the heart of the ADA. Exempting cruise ships from the requirements of Title III would adversely affect ACB's membership by limiting the transportation and travel opportunities of an entire segment of the population.

The National Multiple Sclerosis Society is a nonprofit organization serving people with multiple sclerosis ("MS") in every state. Founded in 1946, the Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through a nationwide network of chapters, the National MS Society supports research efforts, educates, provides a variety of empowering

programs, organizes fund-raising events, and advocates for people with disabilities.

The Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems provides training and technical assistance to the nationwide network of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. This case is of particular interest to TASC/ NAPAS because P&As frequently represent people with disabilities in ADA Title III cases.

SUMMARY OF ARGUMENT

When Congress passed the ADA, it deliberately crafted the Act's public accommodations provisions to reach broadly and to cover entities like cruise ships. Congress did not only seek in Title III to guarantee persons with disabilities access to the bare necessities of life like grocery stores and hospitals; rather, Congress decided to include within the Act's scope cultural outlets that make life more fulfilling, such as theaters, museums, health spas, and amusement parks. Representations of cruise ships in literature, movies, television, and other media demonstrate the cultural significance of cruise ships and the ways in which vacations on them epitomize the best of what life has to offer. Therefore, permitting cruise lines to avoid the public accommodations provisions of the ADA would subvert Congress' stated goal of permitting people with disabilities to participate fully in society.

In addition, for many people with disabilities, taking a cruise is an ideal vacation option because cruise ships offer, in a relatively small space, an incredible array of leisure ac-

tivities. Cruise ships generally contain restaurants, bars, movie theaters, shopping outlets, casinos, sunbathing decks, swimming pools, live music and theater, educational programs, health spas, and gymnasiums. Thus, a traveler with a disability, who may have limited mobility, need not leave the ship to enjoy a host of entertainment options. She need only unpack once over the course of her vacation. If she requires rest in the middle of the day, she can return to her cabin at any time. And if the need arises, she can avail herself of onboard medical services. Research has found that people with disabilities are fifty percent more likely to have taken a cruise in the past five years than the population at large.

As a result, many cruise lines actively target persons with disabilities in their marketing materials and promotional activities. When the federal agency charged by statute with creating ADA accessibility standards convened an advisory committee to propose accessibility standards for cruise ships, representatives from the cruise line industry served as committee members and were actively involved in drafting recommendations for proposed regulations addressing accessibility on newly constructed and altered passenger vessels and cruise ships. Several cruise lines have already voluntarily implemented many of these recommendations. As a result, any concern about the feasibility of industry compliance is misplaced. Accommodating people with disabilities on cruise ships is not simply viable, but, as experience has shown, can be advantageous for the industry. This Court should therefore reverse the judgment of the Fifth Circuit.

ARGUMENT

I. EXEMPTING CRUISE SHIPS FROM TITLE III OF THE ADA WOULD SUBVERT CONGRESS' GOAL OF FULL PARTICIPATION IN SOCIETY BY PEOPLE WITH DISABILITIES.

A. The Plain Text of the ADA and Its Legislative History Evidence Congress' Goal of "Full Participation."

When it passed the ADA in 1990, Congress recognized "the continuing existence of unfair and unnecessary discrimination" against people with disabilities. 42 U.S.C. § 12101(a)(9). Congress sought to remedy this invidious discrimination through the public accommodations provisions of Title III, which were designed to assure "full participation" by people with disabilities in all aspects of American society. *Id.* § 12101(a)(8).

That sentiment is clearly embraced by the text of the Act itself: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any* place of public accommodation by *any* person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). As the House Committee on Public Works and Transportation noted in its final report, "[t]he [ADA] will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities *fully* into the mainstream of American society." H.R. Rep. No. 101-485(I) (1990), at 24 (emphasis added); *see also* H.R. Rep. No. 101-485(III), at 22 ("The purpose of the [ADA] is to provide a clear and comprehensive national mandate to end discrimi-

nation against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.").

To achieve this goal of full participation, Congress made the public accommodations provisions of the ADA broad in scope; the sweep of ADA coverage reaches more entities and services than any of Congress' earlier civil rights statutes.[2] Notably, the Act does not limit its coverage to only those businesses and services that a person with a disability would need in order to meet the day-to-day requirements of contemporary life. Rather, the provisions cover almost all aspects of public life and human interactivity. In addition to requiring accessibility for more basic needs (e.g., grocery stores and hospitals), Title III expressly includes concert halls, galleries, museums, health spas, amusement parks, or any "other place of recreation" in order to ensure that people with disabilities have access to cultural outlets that make life joyous, not just possible. *See* 42 U.S.C. § 12181(7). That Congress opted to explicitly include these signifiers of a fully-lived life is unsurprising in light of its finding that "persons with disabilities . . . have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life." H.R. Rep. No. 101-485(III), at 25 (citing Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream* (1986)). Thus, in

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[2] *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 385-87 (2001) (comparing scope of Title III to the narrower public accommodations provisions of the Civil Rights Act of 1964); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 470-73, 493-501 (1991) (noting that Title III covers, "with a few exceptions such as the sale or rental of housing, almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public").

passing the ADA, Congress sought to help people with disabilities realize one of their greatest dreams — to live an unconstrained life that includes everything society has to offer.[3]

B. Given the Popular Appeal of Cruise Ships, "Full Participation" Must Include Equality of Access on Board

Cruise ships have long held a special place in the American cultural psyche, and their rich history has been well documented and fictionalized in print, film, and television. *See, e.g.*, Kurt Ulrich, MONARCHS OF THE SEA (1999, St. Martin's Press); TITANIC (Paramount Studios, 1997); Frederick Emmons, AMERICAN PASSENGER SHIPS: THE OCEAN LINES AND LINERS, 1873-1983 (1985, Univ. of Del. Press); THE LOVE BOAT (1977-1986, ABC Television). As the recent media coverage of the maiden voyage of the *Queen Mary 2* attests, cruise ships continue to operate as a cultural signifier of the good life. *See* Melissa Grace, et al., *Bow to the Queen: New Yorkers Stand at Attention as* QM2 *Ends 1st Voyage Here*, N.Y. DAILY NEWS, Apr. 23, 2004, at 2; James Barron, *A Queen Arrives, and Even in Jaded New York, Jaws Drop*,

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[3] As testimony before Congress repeatedly emphasized, attainment of the "American dream" for people with disabilities was a primary goal of the ADA. *See, e.g.*, S. Rep. No. 101-116, at 20 (1989) (citing testimony that the ADA would permit people with disabilities to "have the same aspirations and dreams as other American citizens" and "know that their dreams can be fulfilled," and that America is true to its ideal of equality, which is "the full measure of the American dream"); *id.* at 96 (additional views of Sen. Hatch) ("Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream. It is time for that dream to become a reality."); 136 Cong. Rec. S9684 (July 13, 1990) (statement of Sen. McCain) ("Mr. President, this bill is an important step in making the American dream available to all . . . . The freedom to pursue the American dream is at the heart of what makes our Nation great.").

N.Y. TIMES, Apr. 23, 2004, at B2. The media covered the *QM2*'s arrival live on national television, and the ship was welcomed in the U.S. with fireworks, water jet displays, a U.S. Navy destroyer escort, visits by dignitaries, ballet and symphony performances, charity balls, and a formal ceremony in which a U.S. Postal Service official received the Royal Mail. *See, e.g., Today* (NBC television broadcast, Apr. 22, 2004); Tom Stieghorst, et al., *A Queen of Our Own: Cheering Crowds, Streams of Confetti, and Powerful Horn Blasts Greet the* Queen Mary 2, SUN-SENTINEL (Fort Lauderdale, Fla.), Jan. 27, 2004, at 1A.

Just last month, Colin Veitch, CEO of Respondent Norwegian Cruise Line, appeared on Good Morning America to award complimentary ten-day cruises to 125 couples who had just renewed their wedding vows live on national television.[4] *Good Morning America* (ABC television broadcast, Nov. 18, 2004). According to Veitch, "[w]e know there's no better vacation and romantic experience than a cruise with the one you love." Press Release, Norwegian Cruise Line, Norwegian Cruise Line Gives Away 125 Surprise 'Second Honeymoons' at Reaffirmation Ceremony on Good Morning America (Nov. 18, 2004). Statistics would appear to lend some credence to Veitch's claim; a recent study sponsored by the cruise industry found that almost 69 million Americans have indicated a desire to take a cruise. *See* International Council of Cruise Lines ("ICCL"), *Cruise Industry FAQs*, *available at* http://www.iccl.org/faq/cruising.cfm (last visited Nov. 29, 2004) (describing a cruise as "everyone's dream vacation").

The continued public appeal of cruise ships has fueled unparalleled growth in the industry. Tens of millions of peo-

[4] The press release issued by Respondent stated that these second honeymoons were aboard Respondent's ship *Norwegian Dawn* "which is homeported in New York City year round." The *Dawn*, however, flies the flag of the Bahamas.

ple have taken a cruise in the past two decades, *id.*, and despite a general economic downturn in the rest of the tourist industry post–9-11, the cruise industry has "continued its record growth," it has "maintain[ed] its historically high occupancy rate," and it "continue[s] to expand its contribution to economic activity in the United States." ICCL, *The Cruise Industry: 2002 Economic Summary*, *available at* http://www.iccl.org/resources/2002EconomicStudySummary.pdf (last visited Nov. 29, 2004). Cruise vacations consistently rank highest in satisfaction ratings among travel options. ICCL, *Cruise Industry FAQs*, *supra*. It is not difficult to locate the source of the cruise industry's popular success. Besides occupying a unique place in our collective consciousness, "a cruise offers all the things most people want in a vacation — romance, excitement, relaxation, adventure, escape, discovery, luxury, value and more." *Id.*

It is practically stating the obvious to note that "full participation" in society includes the ability to enjoy these celebrated aspects of human existence. Philosophers have observed for centuries that "being able to laugh, to play, to enjoy recreational activities" are central to the attainment of a fully-lived life. Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 222 (1992).[5] As noted above, Congress recognized just how important these activities are when it included leisure-focused entities such as health spas, museums, and amusement parks in the list of public accommodations covered by Title III of the ADA. *See* 42 U.S.C. § 12181(7). As the Eleventh Circuit observed in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), cruise ships are essentially floating public leisure and recreation centers. "Cruise ships, in fact, often contain places of lodging, restau-

[5] *Quoted in* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1015 (2004).

rants, bars, theaters, auditoriums, retail stores, gift ships [sic], gymnasiums, and health spas." *Id.* at 1241.

The Fifth Circuit did not suggest otherwise in its holding below. *See Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 644 (5th Cir. 2004) (noting that Respondent did not dispute district court's finding that cruise ships are "public accommodations" under Title III). But to follow the Fifth Circuit's lead and exempt a cruise ship from the requirements of Title III simply because the operator has chosen to fly a foreign flag of convenience rather than an American flag, would seriously undermine Congress' goal of full participation by people with disabilities in all aspects of American life, especially in light of the remarkable position cruise ships occupy in American culture.[6] *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (explaining that Title III "should be construed liberally" to further congressionally mandated goals, and finding that a professional golf competition is therefore a "public accommodation" under the ADA).

[6] As Petitioners explain on page 13 of their Petition for a Writ of Certiorari, no cruise ships serving United States mainland ports fly the American flag. Nevertheless, the cruise line industry derives almost all of its revenues from commercial activity in the United States, and the industry's ships are built, furnished, and operated with the American passenger in mind. *See* ICCL, *The Cruise Industry: 2003 Economic Summary*, *available at* http://www.iccl.org/resources/2003_econstudy-analysis.pdf (last visited Nov. 29, 2004) (noting that "passenger embarkations at U.S. ports . . . accounted for 72 percent of the global embarkations" and that U.S. residents constituted 76 percent of all passengers worldwide).

II. THE CRUISE SHIP INDUSTRY'S COMPLIANCE WITH TITLE III IS FEASIBLE AND WOULD NOT BE UNDULY ONEROUS GIVEN THE APPEAL OF CRUISES TO PERSONS WITH DISABILITIES.

A. The Final Report of the Passenger Vessel Access Advisory Committee Provides Workable Standards for the Cruise Ship Industry's Compliance with Title III.

The ADA mandates that the Architectural and Transportation Barriers Compliance Board ("Access Board") play an active role in making sure that public accommodations are "accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. § 12204. In furtherance of this mandate, the Access Board is required to issue minimum guidelines and requirements for accessibility, which federal agencies are then required to incorporate into any final enforcement regulations issued pursuant to section 306 of the ADA. *See* 42 U.S.C. § 12186(c).

In August 1998, the Access Board created the Passenger Vessel Access Advisory Committee ("PVAAC") to provide recommendations for a proposed rule addressing accessibility guidelines for newly constructed and altered passenger vessels and cruise ships covered by the ADA. The PVAAC was composed of twenty-one members representing various groups, including owners and operators of passenger vessels and cruise lines, designers of passenger vessels, and organizations representing individuals with disabilities.[7] For

[7] The Committee's membership included American Classic Voyages, American Council of the Blind, American Sail Training Association, American Society of Travel Agents, BB Riverboats, Boston Commission for Persons with Disabilities, Chesapeake Region Accessible Boating, International Council of Cruise Lines, National Tour Association, Paralyzed Veterans of America, Pas-

example, the International Council of Cruise Lines (of which Respondent Norwegian Cruise Line is a member) served on the Committee, as did *amici* Paralyzed Veterans of America and American Council of the Blind. The PVAAC explored ways in which to achieve access in light of competing considerations, and it made recommendations (in the form of a Final Report) for the Access Board to use in developing guidelines. *See* Summary of the Report from the Passenger Vessel Access Advisory Committee, *available at* http://www.access-board.gov/pvaac/commrept/report-summary.htm (last visited Nov. 29, 2004).

Amici PVA and ACB representatives were active members of the PVAAC and worked collaboratively with other Committee members (including industry representatives) to provide recommendations to the Access Board regarding how newly constructed and altered passenger vessels would comply with the ADA. The PVAAC submitted its Final Report to the Board in December 2000.[8] In developing the Final Report, the PVAAC applied the existing ADA Accessibility Guidelines for Buildings and Facilities to passenger vessels and then modified certain "building" provisions which the Committee determined would be problematic if ap-

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senger Vessel Association, Port of San Francisco, Princess Cruises, Rhode Island Tourism Division, Self Help for Hard of Hearing People, Society for the Advancement of Travel for the Handicapped, Society of Naval Architects and Marine Engineers, Southeast Alaska Independent Living, Southwest Disability and Business Technical Assistance Center, Transportation Institute, and the Washington State Department of Transportation. *See* Passenger Vessel Access Advisory Committee Members, *available at* http://www.access-board.gov/pvaac/CommList.htm (last visited Nov. 29, 2004).

[8] The Final Report is available online at http://www.access-board.gov/pvaac/commrept/index.htm (last visited Nov. 29, 2004).

plied to seagoing vessels.[9] Vessel owners and operators understood that the applicability of the ADA would require at least some degree of accessibility aboard passenger vessels, as well as embarking and disembarking.[10]

Several cruise lines have already implemented many of the recommendations of the PVAAC. For example, Royal Caribbean states that every ship in its fleet has staterooms that are specially designed to be wheelchair accessible, and the company has undertaken a multimillion dollar renovation pro-

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[9] The PVAAC relied primarily on the original ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") that the Board issued in 1991. *See* 56 Fed. Reg. 35408 (July 26, 1991). The PVAAC also considered the "Recommendations for a New ADAAG" published on September 30, 1996, by another Access Board advisory committee. *See* ADAAG Review Advisory Committee's Recommendations, *available at* http://www.access-board.gov/ada-aba/commrept.htm (last visited Nov. 29, 2004). The Access Board eventually issued a revised version of its Accessibility Guidelines for Buildings and Facilities in July 2004. *See* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 69 Fed. Reg. 44084 (July 23, 2004).

[10] While the PVAAC issued its Final Report to the Access Board almost four years ago, the Access Board only recently released its draft guidelines based on the Report. *See* Americans with Disabilities Act Accessibility Guidelines for Passenger Vessels; Large Vessels, 69 Fed. Reg. 69244 (Nov. 26, 2004); *see also* Board Releases Information for Guidelines for Passenger Vessels (Nov. 26, 2004), *available at* http://www.access-board.gov/news/pvag.htm (last visited Nov. 29, 2004). The draft guidelines reflect most of the recommendations contained in the PVAAC's Final Report. As explained above, however, the PVAAC relied on the 1991 version of the ADAAG in preparing its Final Report, and the Access Board has since issued a revised ADAAG. *See supra* note 9. As a result, the new draft guidelines borrow several standards from the revised ADAAG, rather than from the PVAAC's recommendations.

ject to make its fleet more accessible.[11] Accommodations on Royal Caribbean ships include extra-wide corridors, hydraulic pool and Jacuzzi lifts, and ramps in terraced public areas; Braille on menus, stateroom doors, service directories and elevator buttons; portable kits for people who are deaf or hard of hearing, including TTY (Text Telephone)/TDD (Telecommunication Device for the Deaf), personal notification systems, and strobe alarms; and closed-captioned televisions, amplified telephones in staterooms and public areas, and infrared audio receiver systems.[12] Other cruise lines have implemented similar accessibility measures. Indeed, Princess Cruise Lines highlights its involvement with PVAAC and the Access Board in its "Policy Statement on Accessibility for Passengers with Disabilities."[13] When Carnival Corporation decided in 2001 to settle a class-action lawsuit brought to make Carnival's cruise ships ADA compliant, the parties incorporated into their settlement agreement accessibility standards from the PVAAC's Final Report.[14]

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[11] Royal Caribbean International, Accessibility Onboard, *available at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/home.do (last visited Nov. 29, 2004). The website also provides specific information regarding accessibility for individuals with visual, hearing, and other mobility impairments.

[12] Press Release, Society for Accessible Travel and Hospitality, Royal Caribbean International Supports SATH (July 27, 2004), *available at* http://www.sath.org/index.html?section=Press Releases&id=4259 (last visited Nov. 29, 2004).

[13] *See* Princess Cruise Lines, Accessibility for Passengers with Disabilities, *available at* http://www.princess.com/about/policy.jsp?policyId=na405 (last visited Nov. 29, 2004). The website also discusses future fleet renovations designed to further expand accessibility.

[14] *See Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233-Civ (S.D. Fla. Apr. 18, 2001) (Ex. 1 to Notice of Conditional Class Certification, Proposed Settlement, and Fairness Hearing).

Thus, as the foregoing demonstrates, the Final Report of the PVAAC provides a sound basis for workable and appropriate accessibility standards for the cruise ship industry. Any concerns about the feasibility of compliance are therefore misplaced and certainly do not justify exempting the industry from the public accommodations provisions of the ADA.

B. An Accessible Cruise Is an Ideal Vacation Option for Persons with Disabilities, and Many Cruise Lines Actively Market to Persons with Disabilities.

In 2003, the Travel Industry Association of America, the Open Door Organization, and the Society for Accessible Travel and Hospitality released the results of a Harris Interactive Survey that examined the vacation habits of people with disabilities. The Survey found that 12 percent of the population with disabilities had taken a vacation cruise in the preceding five years, compared to 8 percent of the population at large.[15] The Harris Survey also found that people with disabilities spend over $13 billion each year on vacations, and that this market will only expand in the future.[16] According to the Travel Industry Association, because of aging baby-boomers, persons with disabilities will make up to 24 percent of the U.S. population by the year 2030.[17]

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[15] *See* Deborah Alexander, *Vacationing with Disabilities: New Travel Market Is Opening Up on the Road*, OMAHA WORLD-HERALD, May 23, 2003, at 1D; *see also A League of Their Own*, EXCEPTIONAL PARENT, Vol. 34, No. 5, May 1, 2004, at 42.

[16] *See* Alexander, *supra* note 15.

[17] *See* Tricia Holly, *Able Bodies, Open Minds: Learning to Serve the Disabled Travel Market Is Daunting but Well Worth the Effort of Travel Agents*, TRAVEL AGENT, Vol. 311, No. 2, Jan. 13, 2003, at 20.

For many people with disabilities, an accessible cruise is an ideal vacation option because cruise ships offer, in a relatively small space, an incredible array of leisure activities. Cruise ships frequently contain restaurants, bars, movie theaters, shopping outlets, casinos, sunbathing decks, swimming pools, live music and theater, educational programs, health spas, and gymnasiums. Thus, a traveler with a disability, who may have limited mobility, need not leave the ship to enjoy a host of entertainment options. The cruiser with disabilities also has access to reliable, onboard medical services, a fact particularly comforting when traveling to foreign locales.[18] The traveler need only unpack once over the course of her vacation, and if she requires rest in the middle of the day, she can simply retire to her cabin.[19] Furthermore, the consistent availability of ship staff ready to provide assistance when

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[18] While not required to do so by the ADA, most cruise lines provide quality medical services on board. *See, e.g.*, Princess Cruise Lines, Shipboard Medical Program, *available at* http://www.princess.com/about/policy.jsp?policyId=na397 (last visited Nov. 29, 2004); Crystal Cruises, Shipboard Life: Medical Services, *available at* http://www.crystalcruises.com/onboard.aspx?ID=9#id36 (last visited Nov. 29, 2004). The cruise lines typically require each onboard physician to have an American medical license, or its equivalent, and not a license from the country whose flag the ship flies. *See, e.g.*, Carnival Cruise Lines, Is There a Doctor on Board?, *available at* http://www.carnival.com/CMS/FAQs/Medical_Services.aspx (last visited Nov. 29, 2004) ("Doctors on our ships are required to have a current and valid medical license from the USA, one of its territories, or Canada, Australia, New Zealand or South Africa, or have full registration with the British General Medical Counsel of the United Kingdom or current full registration with the British General Medical Council of the United Kingdom, or current full registration with the medical council of a member country of the European Union.").

[19] *See* Karin Esterhammer, *Sailing on Four Wheels: A Short Voyage to Mexico Proves to Be Easy Going for a Wheelchair-Bound Vacationer*, L.A. TIMES, Feb. 6, 2000, at L5.

necessary affords someone with a disability a high level of comfort and security while traveling.[20] It is therefore hardly surprising that persons with disabilities are fifty percent more likely to have taken a cruise in the past five years than the population at large.[21]

Cruise lines have recognized the appeal that cruises have for people with disabilities, and the industry has actively exploited their market potential. Carnival Cruise Lines has produced a brochure for people with disabilities entitled "Easy Access to Fun" specifically aimed at the traveler with a disability, and the cruise line has experienced remarkable growth in that segment of the market.[22] When the Royal Caribbean cruise line launched its newest ship *Mariner of the Seas* in 2003, the company chose Jean Driscoll, an Olympic wheelchair champion and advocate for people with disabilities, to be the ship's "godmother" in order to highlight the ship's accessibility. At the *Mariner*'s official launch, Driscoll christened the ship, pushing a remote-control button to release a bottle of champagne against the hull.[23]

Despite these public gestures, and despite the market potential presented by persons with disabilities, some cruise lines, such as Respondent Norwegian Cruise Line, have failed to make their ships fully accessible, as the instant litigation attests.[24] However, given that many cruise lines have recog-

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[20] *See* Dian McDougall, *Ships Meet Special Needs*, TORONTO SUN, Dec. 1, 2002, at T3.

[21] *See* Alexander, *supra* note 15.

[22] *See* Holly, *supra* note 17 (noting that "the number of disabled passengers shot up 36 percent between 2000 and 2001" and "predict[ing] an even larger increase in 2002").

[23] Victoria Stevens, *Royal Treatment: Royal Caribbean Line Launches Its Newest Luxury Ship, the Mariner of the Seas*, TORONTO STAR, Nov. 27, 2003, at H01.

[24] Complaints regarding accessibility concern physical barriers as well as a lack of preparedness of the crew and misleading prom-

nized the benefits of reaching out to persons with disabilities, demanding industry-wide compliance with Title III of the ADA cannot be considered unduly onerous. Therefore, since the PVAAC has determined that it is feasible for cruise ships to become reasonably accessible to persons with disabilities, and since people with disabilities constitute a lucrative market segment, there is no reason to exempt cruise ships from the public accommodations provisions of the ADA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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ises made by travel agents. *See* Lee Romney, *Cruise Lines, Disabled Spar Over Accessibility*, L.A. TIMES, Sept. 28, 2004, at B1; *see also* Curtis D. Edmonds, *Won't You Let Me Take You on a Sea Cruise: The Americans With Disabilities Act and Cruise Ships*, 28 TUL. MAR. L.J. 271 (2004) (summarizing cases).

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No. 03-1388

In the Supreme Court of the United States

DOUGLAS SPECTOR, ET AL.,
Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF TEXAS, ARIZONA, CALIFORNIA, ILLINOIS, MASSACHUSETTS, MISSOURI, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether and to what extent Title III of the Americans with Disabilities Act (ADA) applies to companies that operate foreign-flag cruise ships in United States waters?

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INTEREST OF *AMICI CURIAE*

Amici States have a strong interest in protecting their citizens with disabilities and ensuring that Title III of the ADA, 42 U.S.C. §12181 *et seq.*, is properly enforced within United States territory—especially when its nonenforcement not only denies those citizens their right to freedom from disability-based discrimination aboard a popular type of common carrier, but indeed puts their lives at risk in the event of an emergency. Given the significant number of citizens with disabilities who take cruise vacations each year,[1] the States have a particular interest in ensuring that foreign-flag ships that voluntarily subject themselves to United States law by docking at American ports and picking up American passengers are subject to Title III.

The Attorney General of Texas, and the attorneys general of *amici* States, are committed to vigilantly defending the rights of citizens with disabilities within the several States. It is the express policy of the State of Texas "to encourage and enable persons with disabilities to participate fully in the social and economic life of the state, to achieve maximum personal independence, to become gainfully employed, and to otherwise fully enjoy and use all public

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1. In 2002, Americans with disabilities spent $13.6 billion on travel, and 12% of those surveyed in a recent study had taken a cruise vacation within the preceding five years. Deborah Alexander, *Vacationing with Disabilities: New Travel Market Is Opening Up*, OMAHA WORLD HERALD, May 23, 2003, at 2D; *see also* Lynnley Browning, *From Beaches to Cities, Efforts to Serve Disabled Travelers*, N.Y. TIMES, Oct. 19, 2003, §3, at 9 (noting that approximately 11 million Americans with disabilities take cruises and engage in other forms of travel once or more each year). According to the International Council of Cruise Lines, 80 percent of the cruise-ship industry's economic impact was concentrated in ten states including Florida, California, New York, Alaska, Texas, and Washington. Press Release, Cruise Industry Economic Impact Topped $25 Billion in 2003 (August 24, 2004), *at* http://www.iccl.org/pressroom/pressrelease.cfm?whichrel=56 pressrelease.cfm?whichrel=56 (last visited Nov. 12, 2004).

facilities available within the state." TEX. HUM. RES. CODE §121.001. This policy statement and the substantive protections that follow it in the Texas Human Resources Code reflect Texas's commitment to its citizens with disabilities in a way that parallels both the United States's commitment embodied in Title III and the similar commitments of other States.[2]

SUMMARY OF THE ARGUMENT

Norwegian Cruise Line Ltd. (NCL) operates cruise ships that pick up American vacationers from American ports, and it also sells tickets for its cruises from offices on American soil. The plain text of the ADA protects Americans traveling on common carriers such

2. *See* ALA. CODE §21-7-3; ALASKA STAT. §18.80.200; ARIZ. REV. STAT. §41-1492.02; ARK. CODE ANN. §20-14-303; CAL. CIV. CODE §54.1; COLO. REV. STAT. §24-34-601; CONN. GEN. STAT. §46a-7; DEL. CODE ANN. tit. 6, §4503; FLA. STAT. ANN. §760.07; GA. CODE ANN. §30-4-2; HAW. REV. STAT. §489-3; IDAHO CODE §56-703; 775 ILL. COMP. STAT. 5/5-102; IND. CODE §22-9-1-2; IOWA CODE §216.7; KAN. STAT. ANN. §44-1009; KY. REV. STAT. ANN. §344.120; LA. REV. STAT. ANN. §49:146; ME. REV. STAT. ANN. tit. 5, §459; MD. ANN. CODE art. 49B, §5; MASS. GEN. LAWS ch. 272, §98; MICH. COMP. LAWS §37.1302; MINN. STAT. §256C.02; MISS. CODE ANN. §43-6-5; MO. REV. STAT. §213.065; MONT. CODE ANN. §49-2-304; NEB. REV. STAT. §20-132; NEV. REV. STAT. 651.070; N.H. REV. STAT. ANN. §155:39-b; N.J. STAT. ANN. §10:5-29; N.M. STAT. ANN. §28-7-3; N.Y. EXEC. LAW §296; N.C. GEN. STAT. §168-3; N.D. CENT. CODE §14-02.4-0; OHIO REV. CODE ANN. §4112.02; OKLA. STAT. tit. 25, §1402; OR. REV. STAT. §659A.142; 43 PA. CONS. STAT. §955; R.I. GEN. LAWS §§11-24-2, 42-87-1, & 42-112-1; S.C. CODE ANN. §43-33-20; S.D. CODIFIED LAWS §20-13-23.1; TENN. CODE ANN. §62-7-112; UTAH CODE ANN. §26-30-1; VT. STAT. ANN. tit. 9, §4500; VA. CODE ANN. §51.5-44; WASH. REV. STAT. §49.60.215; W.VA. CODE §5-15-4; WIS. STAT. §101.13; WYO. STAT. ANN. §35-13-201; *see also* D.C. CODE ANN. §2-1402.31; 19 GUAM CODE ANN. §2115.

as cruise ships, and this Court should give full effect to that unambiguous congressional intent.

In concluding that Title III of the ADA is inapplicable to foreign-flag cruise ships and the companies that operate them within United States territory, the court of appeals overlooked specific statutory language, this Court's case law, legislative history, and two federal agencies' opinions. In addition to these authorities, the absence of any other federal law aimed at preventing disability-based discrimination by cruise-ship operators further confirms Title III's applicability.

It is fully within Congress's authority to regulate foreign-flag cruise ships departing from United States ports and sailing in United States waters, and Congress chose to exercise that authority in Title III. The provision's plain language demonstrates Congress's intent to apply the statute to common carriers such as cruise ships. Although the court of appeals correctly observed that Congress is generally presumed not to intend to apply federal law outside of United States territory or to regulate the internal affairs of foreign vessels, the application of Title III to foreign-flag cruise ships in United States territory is entirely consistent with both of these presumptions.

The Court's opinions show that the safety and equal treatment of fee-paying vacationers do not fall within the scope of the "internal management and affairs" of a foreign ship—a term of art that refers to relations between a ship's crew and its owner. This Court's recognition of "delicate issues of international relations" that the court of appeals identifies likewise arises only in this narrow labor-law context, and it provides no basis for applying a presumption against Title III's applicability in the common-carrier setting.

Even if the Court were to broaden the meaning of "internal management and affairs" of a foreign ship to encompass the

conduct and conditions underlying some of Petitioners' claims, their other claims under Title III would not fall within that phrase's purview. The sale of tickets on United States soil has no connection to matters occurring aboard a ship, and issues concerning only whether a ship's physical structure permits citizens with disabilities to access facilities such as public restrooms and decks used for emergency evacuation have nothing to do with a crew's duties or a ship's operations.

The court of appeals also erred in concluding that this case involves the potential for extraterritorial application of federal law. Petitioners' claims challenge only NCL's conduct on American soil and the condition and onboard procedures of its ships sailing in United States waters. Additionally, intrinsic limitations on Title III's enforcement ensure that the statute will not be applied to cruise ships unreasonably, in a way that contravenes foreign or international design standards. Accordingly, the Court should reverse the court of appeals's judgment and hold that Title III applies to foreign-flag cruise ships within the United States's territorial waters.

ARGUMENT

I. FOREIGN-FLAG CRUISE SHIPS FALL WITHIN THE SCOPE OF TITLE III.

Title III forbids discrimination against Americans with disabilities aboard common carriers and in other places of public accommodation. In reaching the erroneous conclusion that the statute is inapplicable to foreign-flag cruise ships in United States waters, the court of appeals overlooked several dispositive sources of law: the opening provisions of the ADA, which express Congress's clear intent for the Act to apply broadly to protect Americans with disabilities from discrimination; the relevant legislative history, which reflects an intent to apply Title III's protections to the full gamut of "public accommodations"; and two

federal agencies' opinions, which conclude that Title III applies to foreign-flag cruise ships.

Moreover, the court of appeals's holding that Title III does not apply to foreign ships that pick up American passengers from American soil creates an unintended loophole in federal law. If the court of appeals's opinion stands, a major class of common carriers will be able to reap the substantial economic benefits of collecting fares from Americans with disabilities while remaining free to disregard those citizens' rights to accessibility, safety, and freedom from discriminatory pricing practices.

A. Title III Applies to Common Carriers That Sail in American Waters, Dock at American Ports, and Pick Up American Passengers.

At the outset of its analysis, the court of appeals recognized two foundational principles. First, it noted that by voluntarily sailing into the territorial limits of the United States, a foreign ship subjects itself to the laws and jurisdiction of the United States. *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 644 (CA5 2004), *cert. granted*, 125 S.Ct. 26 (U.S. Sept. 28, 2004) (citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)). Second, it observed that only clear congressional intent will support the exercise of jurisdiction over such a ship. *Ibid.* (citing *Benz*, 353 U.S., at 147). In other words, Congress has full authority to exercise jurisdiction over foreign-flag cruise ships in American waters. The question is whether it has chosen to do so. The text of Title III, this Court's opinions, the relevant legislative history, and opinions issued by the United States Departments of Justice (DOJ) and Transportation (DOT) establish that lack of specific language about cruise ships does not defeat Congress's clear intent about the breadth of Title III's reach.

1. The plain text of Title III applies to cruise ships.

The starting point of statutory analysis is the text of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (explaining that the first step in analyzing a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute" and that the analysis ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent'") (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

By its terms, Title III applies to common carriers: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of *specified public transportation* services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce. " 42 U.S.C. §12184(a) (emphasis added). "[S]pecified public transportation," in turn, is expressly defined as "transportation by bus, rail, *or any other conveyance* (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis"). *Id.* §12181(10) (emphasis added).

A cruise ship, of course, is a "conveyance" that "provides the general public with . . . service . . . on a regular and continuing basis." *Ibid.* And the phrase "any other" is broad and subject to no limitation beyond the parenthetical "other than by aircraft"—which, in effect, proves the rule. *Ibid.* Aircraft, like cruise ships, would naturally fall under "any other conveyance" but for the exception. And the exception for aircraft is explained by their coverage under a separate statute, the Air Carrier Access Act (ACAA), 49 U.S.C. §41705 *et seq.* *See infra* Part I(B) (discussing the ACAA). Because no separate statute applies to cruise ships, Title III provides no exception for them.

Because the plain text of "any other conveyance" includes cruise ships, the question then becomes whether to impute an additional limitation—"except those operating under foreign flags"—into the statute. Notwithstanding the statutory text, the court of appeals created just such an exception. But further examination of the ADA demonstrates that Congress had no such intent.

The ADA states that its purpose is "to invoke *the sweep of congressional authority* . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(b)(4) (emphasis added). By its terms, this statement is "the affirmative intention of the Congress clearly expressed," *Benz*, 353 U.S., at 147, to apply the ADA in every context in which Congress has the power to do so and in which it has not already provided Americans with disabilities with other forms of protection. *See* 42 U.S.C. §12101(b)(1) (stating that the ADA was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *infra* Part I(B) (discussing the Air Carrier Access Act, which provides non-ADA protection to Americans with disabilities who travel on air carriers).

Under the general heading of "Public Accommodations and Services Operated by Private Entities," Title III addresses some of the "major areas of discrimination" referred to in Congress's statement of the ADA's purpose, and NCL does not dispute that cruise ships fall within the meaning of both "public accommodation" and "specified public transportation service," as Title III defines those terms. 42 U.S.C. §12181(7), (10); *Spector*, 356 F.3d, at 644 n.3; *see Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1240 n.3 (CA11 2000). In the judgment of the court of appeals, however, this language is insufficiently specific to encompass foreign ships. *See Spector*, 356 F.3d, at 646 (basing the Court's ultimate conclusion partly on the absence of specific

mention of foreign-flag cruise ships in the language of the ADA). But even if Title III's language leaves any doubt about its coverage of cruise ships, case law, legislative history, and the opinions of two federal agencies resolve it.

2. The Court's precedent supports Petitioners' reading of Title III's scope.

The Court has made clear that Congress need not refer specifically to foreign-flag ships in order to invoke its authority over them. In *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 126 (1923), the Court reasoned that because the National Prohibition Act stated no exception precluding its application to foreign ships that sailed in United States waters, a conclusion that it failed to reach such ships "would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied." The court of appeals attempted to distinguish *Cunard* on the ground that this case, supposedly unlike *Cunard*, involves "the possibility of extraterritorial application" of federal law. *Spector*, 356 F.3d, at 648. But as explained below in Part III(A), because Petitioners expressly limit their claims to enforcement of Title III within American territorial waters and on American soil, any concern about extraterritorial application of its protections is misplaced.

In *Steele v. Bulova Watch Co.*, 344 U.S. 280, 284 (1952), the Court addressed a federal trademark law applicable to "all commerce which may lawfully be regulated by Congress." Although the *Steele* Court acknowledged that federal law generally does not apply beyond the United States' borders, *id.*, at 285—and thus could arguably not reach a United States citizen's act of trademark infringement in a foreign country, *id.*, at 281—it nevertheless concluded that the federal statute applied based not only on its "broad jurisdictional grant" and its "sweeping reach into 'all commerce which may lawfully be regulated by Congress,'" *id.*,

at 286-87, but also in light of the effects that the allegedly unlawful conduct would have in this country. *Id.*, at 286. Thus, the Court's precedent clarifies that statutory language like Title III's is broad enough to encompass foreign ships and that specific reference to foreign ships is unnecessary. *See Stevens*, 215 F.3d, at 1241.

By contrast, *Benz* and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the opinions on which the court of appeals based its conclusion, are inapposite. Both cases deal with statutes that do not reflect nearly so comprehensive an intent to protect American citizens as that expressed in 42 U.S.C.§12101(b), and, as addressed below in Part II(B), they involve matters touching on a "delicate field of international relations," *Benz*, 353 U.S., at 147, not implicated by Petitioners' claims in this case.

3. The relevant legislative history supports application of Title III to foreign-flag cruise ships.

Although the ADA's stated purpose of setting forth a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and invoking "the sweep of congressional authority" to do so, 42 U.S.C. §12101(b)(1), (4), should make reference to the statute's legislative history unnecessary, that history supports Title III's application to foreign ships. Reports from both the United States Senate and House of Representatives reflect Congress's intent that the particular "public accommodations" noted in 42 U.S.C. 12181 are merely illustrative and that the "other similar" language used throughout that section "should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities." S. REP. NO. 101-116, at 60 (1989); *see also* H.R. REP. 101-485(II), at 100 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383 (same).

In light of Congress's recognition that, at the time the ADA was passed, seventy-five of the seventy-seven cruise ships in operation sailed under foreign flags, H.R. REP. NO. 102-357, at 2 (1991), the conclusion that Congress intended to exclude foreign-flag cruise ships sailing in American waters from Title III's purview is untenable. Congress's expressed intent is inconsistent with a desire to reach only two ships. The court of appeals's reliance on the *Benz* Court's inability to find sufficient "legislative history evincing Congress's intent to apply the [Labor Management Relations Act of 1947] to foreign-flagged vessels," *Spector*, 356 F.3d, at 645 (citing *Benz*, 353 U.S., at 143-47), is therefore misplaced.

4. Two federal agencies recognize that Title III applies to foreign-flag cruise ships.

Finally, opinions from two United States agencies support the conclusion that Title III covers foreign-flag cruise ships. In 1991, DOJ opined that "mobile facilities (such as cruise ships. . .) . . . would be included in the definition of 'facility'" and would be considered places of public accommodation for purposes of Title III. 28 C.F.R. pt. 36, App. B, at 587. Referring to this DOJ opinion, DOT's final rule implementing the transportation provisions of the ADA declared: "In addition to being public accommodations, cruise ships clearly are within the scope of a 'specified public transportation service'" under Title III. 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991). DOT used this same rule to "make . . . clear its view that the ADA does cover passenger vessels, including . . . cruise ships" and noted that "[v]irtually all cruise ships serving U.S. ports are foreign-flag vessels." *Ibid.*; *see Stevens*, 215 F.3d, at 1243.

In concluding that Title III does not apply to NCL's ships, the court of appeals pointed to DOJ's and DOT's failure to issue barrier-removal regulatory guidelines applicable specifically to cruise ships. *Spector*, 356 F.3d, at 650 n.10. But in light of both

Title III's "readily achievable" safeguard against its own unreasonable application, *see infra* Part III(A), and the diverse nature of Petitioners' Title III claims—only some of which relate to architectural issues aboard NCL's ships, *see infra* Part II(C)—the absence of barrier-removal guidelines does not support the conclusion that Title III is wholly inapplicable to foreign-flag cruise ships and their companies' activities on American soil.

B. The Absence of a Separate Federal Statute Preventing Disability-Based Discrimination in the Cruise-Ship Industry Further Supports Title III's Applicability.

If Congress had intended such a popular mode of vacation travel as international cruises to be free from Title III's reach, it would have ensured that Americans with disabilities were protected from discrimination through other federal law, precisely as it did when it passed the ACAA to prohibit air carriers' discrimination against people with disabilities. 49 U.S.C. §41705; *see Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (CA11 2004) (observing that "airplanes and their accompanying terminals and depots" are subject to the ACAA instead of Title III).

The exception of aircraft in §12181(10), *see supra* Part I(A)(1), makes sense only in light of the ACAA's existence. S. REP. 101-116, at 46 (1989) (to accompany S. 933) (explaining that the Education and Labor Committee "excluded transportation by air because the Congress recently passed the Air Carrier Access Act, which was designed to address the problem of discrimination by air carriers"); H.R. REP. 101-485(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 280 (similar statement by House Committee on Public Works and Transportation); H.R. REP. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 369 (similar statement by House Committee on Education and Labor).

Nothing in either the ADA or its legislative history excludes cruise ships from Title III's reach. Indeed, the broad definition of

"specified public transportation"—especially when read in conjunction with the opening provisions of the ADA announcing Congress's intent to exercise the sweep of its authority to protect Americans with disabilities, 42 U.S.C. 12101(b)—leaves little doubt that Congress intended Title III to protect Americans with disabilities from discrimination by cruise-ship companies and aboard their vessels.[3]

Unlike citizens with disabilities who travel by air, those who take cruise-ship vacations have no comprehensive federal-law protection against disability-based discrimination other than Title III. Although it remains an open question whether Texas Human Resources Code chapter 121 and other similar state statutes, the protections of which largely parallel those of Title III, apply aboard foreign-flag cruise ships, *see Spector v. Norwegian Cruise Line Ltd.*, No. 01-02-00017-CV, 2004 WL 637894, at *9 & n.20 (Tex. App.—Houston [1st Dist.] 2004, no pet. hist.), there is nothing to indicate that Congress—especially in light of its far-reaching purpose in enacting the ADA—decided to rely on the States to fill the void of protection that would exist if Title III did not reach the

3. After the ACAA's passage, several district courts held that ACAA claims are preempted by the Warsaw Convention. *See, e.g., Turturro v. Cont'l Airlines*, 128 F.Supp.2d 170, 180 (S.D.N.Y. 2001) (explaining that, although Congress amended the ACAA to cover foreign air carriers, the amendment was subject to 49 U.S.C. §40105(b), which prevents violation of the Warsaw Convention and other international agreements); *Waters v. Port Auth. of N.Y. & N.J.*, 158 F.Supp.2d 415, 429-30 (D.N.J. 2001) (following *Turturro* to hold that the Warsaw Convention preempts ACAA claims). But because the Warsaw Convention applies exclusively to claims arising from international air transportation, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999), it has no relevance to the question of whether Title III applies aboard foreign-flag cruise ships sailing in United States waters or to their owners' selling tickets on United States soil.

vast majority of cruise ships that sail under foreign flags. H.R. REP. No. 102-357, at 2 (1991) .

II. TICKET PRICING AND THE ACCESSIBILITY AND SAFETY OF FOREIGN-FLAG CRUISE SHIPS ARE NOT MATTERS GOVERNED EXCLUSIVELY BY THE LAW OF THE SHIP'S HOME COUNTRY.

In reaching its conclusion about the scope of Title III, the court of appeals applied a presumption against application of United States law based on its conclusion that recognizing the protections of Title III in this case would infringe upon the "internal management and affairs" of foreign-flag ships. *Spector*, 356 F.3d, at 649. This conclusion is insupportable for three reasons.

First, the opinions that the court of appeals relied upon deal with the narrow subject of relations between commercial ships' labor and management, not the physical safety of fee-paying passengers. Second, and relatedly, even if the conduct of NCL that Petitioners seek to regulate could be construed as touching on ships' internal management and affairs, it does not implicate the "delicate field of international relations" that the Court has been appropriately reluctant to disturb through the application of federal labor law aboard foreign-flag ships. And third, even if this Court were to conclude that *some* of Petitioners' Title III claims relate to the internal affairs of NCL's ships, others unquestionably do not. At the very least, the court of appeals applied the presumption against application of United States law too broadly.

A. Petitioners' Title III Claims Differ in Kind from the Type of Claims That Implicate the Internal Management and Affairs of Foreign-Flag Ships.

The court of appeals failed to recognize the narrow, specialized meaning that this Court has attributed to the "internal management and affairs" of a ship. The Court's opinions have tied the phrase to

the specific context of labor relations between a ship's management and its crew. Petitioners' claims fall outside of this narrow context.

The court of appeals cited *McCulloch*, 372 U.S., at 20, for the presumption that the law of the flag state—rather than federal law—governs a foreign ship's internal affairs. *Spector*, 356 F.3d, at 649. *McCulloch*, in turn, cites *Wildenhus's Case* (*Mali v. Keeper of the Common Jail of Hudson County, N.J.*), 120 U.S. 1, 12 (1887), as support for this principle. 372 U.S., at 20. But like *McCulloch*, which dealt with whether the National Labor Relations Act could apply to the maritime operations of a foreign ship that employed a foreign crew, *id.* at 12, *Wildenhus's Case* had nothing to do with the treatment of passengers aboard a common carrier; rather, it addressed whether, under a treaty between the United States and Belgium, a Belgian counsel was entitled to a writ of habeas corpus granting the release, from a New Jersey jail, of a Belgian subject charged with murder aboard a Belgian ship docked at a New Jersey port. 120 U.S., at 2, 11. As the *Wildenhus's Case* Court explained,

> "it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the *rights and duties of the officers and crew towards the vessel, or among themselves*. And so by comity it came to be generally understood among civilized nations that *all matters of discipline*, and all things done on board, *which affected only the vessel, or those belonging to her*, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require." *Id.*, at 12 (emphasis added).

Wildenhus's Case nevertheless concluded that murder, even when it took place aboard a foreign ship and out of the American public's view, was a crime of such magnitude—and one likely to attract such domestic publicity—that it could not fall within the category of matters relating to the on-board "maintenance of order and discipline" over which the Belgian consul's authority extended. *Id.*, at 16, 19. The Court illustrated the difference between matters governed by the flag-state's law and those governed by federal law by reference to the shoreside effect that an unlawful act committed aboard a ship would have:

> "If [the act] is of a character to awaken public interest when it becomes known, it is a 'disorder,' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. . . . Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction." *Id.*, at 18.

"[T]he peace of the ship or those on board," *ibid.*, has come to refer specifically to labor-management relations. More recent opinions from this Court that articulate the rule on which the court of appeals relied deal exclusively with attempts to apply federal laws that address employment issues between the owners of foreign-flag ships and their crews. *See, e.g., Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 221 (1982) (explaining that "[t]he longstanding tradition of restraint in applying the laws of this country to ships of a foreign country—a tradition that lies at the heart of *Benz* and every subsequent decision—. . . is irrelevant" because the boycott at issue involved an "all-American cast" and neither "aim[ed] at altering the terms of employment of foreign crews on foreign-flag vessels" nor sought "to extend the bill of

rights developed for American workers and American employers to foreign seamen and foreign shipowners"); *McCulloch*, 372 U.S., at 20 (refusing to apply the National Labor Relations Act in connection with an American union's attempt to represent unlicensed foreign seamen employed aboard foreign-flag vessels that sailed to American ports, and basing its conclusion partly on "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship") (citing *Wildenhus's Case*, 120 U.S., at 12); *cf. Stevens*, 215 F.3d, at 1242 (recognizing the narrow meaning of "internal management and affairs").

Indeed, far from a principle broad enough to reach the treatment of fee-paying passengers on vacation cruise ships, the Court's reluctance to allow federal law to apply in settings that will raise delicate issues of international relations does not even extend to all federal law governing labor-management relations. *See Windward Shipping (London) Ltd. v. Am. Radio Ass'n, AFL-CIO*, 415 U.S. 104, 113-14 (1974) (explaining that the picketing of foreign ships undertaken for the benefit of American merchant seamen "do[es] not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres* [*S.S. Co. v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963)]," because the union at issue sought "neither to organize the foreign crews for purpose of representation nor to support foreign crews in their own wage dispute with a foreign shipowner"); *Int'l Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 199-200 (1970) (reasoning that no delicate issues of foreign relations were raised by a dispute that "centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work").

Despite this line of authority's narrow focus, NCL urges the Court to expand "internal management and affairs" beyond well-established boundaries to cover the treatment of fee-paying

American passengers whose specific needs a common carrier had assured would be met. The Court should decline NCL's invitation to broaden this presumption and allow foreign ships to ignore Congress's clear directive.[4]

B. Application of Title III in This Case Raises No "Delicate Issues of International Relations."

Amici States recognize that application of some United States laws to foreign-flag vessels sailing in United States waters may raise difficult issues of international law and affect relations between the United States and other countries. *See, e.g., McCulloch*, 372 U.S., at 16-17 (noting that the National Labor Relation Board's "assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government").

But each of the opinions that the court of appeals relied on deals with employment issues between ships' managers and crews, not the physical safety of fee-paying vacationers on cruise ships. In *Benz*, for instance, the sailors at issue "agreed in Germany to work on the foreign ship under British articles." 353 U.S., at 146. The delicate international-relations issue arose from the sailors' argument that United States law should apply to resolve a labor dispute between the ship's foreign management and its foreign crew. *Id.*, at 142 (noting that "[t]he only American connection was

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4. Even under this Court's early precedents, Petitioners' claims about their safety aboard NCL's ships fall within Title III's reach. If, for example, a fire broke out on a loaded cruise ship while it was docked at a United States port, and all of the Americans with disabilities aboard perished because the means of emergency evacuation were inaccessible to them, that tragedy would almost certainly "awaken public interest," and most people would assuredly agree that the death-toll would "affect the [American] community at large." *Wildenhus's Case*, 120 U.S., at 18.

that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing); *cf. Ariadne Shipping Co.*, 397 U.S., at 198-200 (finding *Benz* and *McCulloch* inapplicable where foreign vessels employed United States citizens to perform short-term work).

The concern about "delicate issues" that the Court recognized in *Benz* is not present in this case because the rights of American vacationers to safety and freedom from discrimination in connection with cruise travel implicates nothing akin to a labor-management dispute among foreign citizens. *See* 28 C.F.R. pt. 36, App. B, at 611 (explaining that, in light of Title III's purpose of "ensur[ing] that public accommodations are accessible to their customers, clients, or patrons," that statute's protections "do[] not extend to areas of a facility that are used exclusively as employee work areas"); *see also Stevens*, 215 F.3d, at 1241 n.5 (noting that "[o]ther parts of a ship, such as the bridge, the crew's quarters, and the engine room, might not constitute public accommodations" covered by Title III).

McCulloch likewise involved an attempt to apply federal labor law aboard a vessel that "flies the flag of a foreign nation, carries a foreign crew and has other contacts with the nation of its flag." 372 U.S., at 12. Highlighting the specific nature of the "delicate field of international relations" at issue, *id.*, at 21, this Court stated that "the overriding consideration is that the [National Labor Relations] Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government." *Id.*, at 16-17. To the best of *amici* States' knowledge, no such vigorous protests have arisen, or are likely to arise, against application of laws that merely protect American citizens against discrimination in connection with vacations they take on cruise ships and other common carriers.

C. Alternatively, at Least Some of Petitioners' Title III Claims Could Not Possibly Relate to the Internal Management and Affairs of Foreign-Flag Ships.

In their live complaint, Petitioners alleged several distinct Title III violations. Amended Compl. ¶¶24-34. Although some of those claims relate to onboard procedures that NCL followed when Petitioners embarked on their cruises, others relate exclusively to on-land activities of NCL and architectural barriers aboard the two ships in question. *Id.* ¶¶31, 32. Even if the Court concludes that some of Petitioners' claims relate to the "internal management and affairs" of NCL's ships, these latter two do not.

1. The sale of tickets on United States soil has no connection to the onboard concerns of a ship.

Title III prohibits not only "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations," 42 U.S.C. §12182(b)(2)(A)(i), but also the utilization of "standards or criteria or methods of administration" that either constitute or perpetuate disability-based discrimination. *Ibid.* §12182(b)(1)(D); *see also* 28 C.F.R. 36.301(c) ("A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part").

At least one of Petitioners' claims alleges the very type of conduct that these portions of Title III address. *See* Amended Compl. ¶32 (alleging that NCL charged Petitioners higher fares

than it charged customers without disabilities and imposed unlawful surcharges). NCL's principal place of business is in Florida, and it routinely does business in Texas. *See id.*, ¶10. Chief among its business activities in Texas and other States is the sale of cruise-ship tickets to prospective American passengers, and Petitioners purchased their tickets to board the cruise ships in question on United States soil. It is thus undisputed that at least one of Petitioners' Title III claims concerns the conduct of NCL on United States land, not its alleged conduct at sea or even the structure or condition of any of its ships.

Yet in determining whether Title III applies, the court of appeals applied the presumption against application of federal law with regard to Title III as a whole, including provisions applicable on United States land. *Spector*, 356 F.3d, at 649 (declaring that "the present case deals with the 'internal management and affairs' of a foreign-flagged ship" and stating that Petitioners' proposed accommodations "would require NCL to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships"). At a minimum, this reasoning is overly broad. Because allegedly discriminatory ticket pricing and sales on dry land in no way implicates any of the onboard concerns that the court of appeals's opinion identifies, the court's broad application of the presumption in favor of foreign ships' control over their internal affairs is insupportable.

2. Architectural issues on cruise ships are fundamentally different from the type of internal management disputes that Congress is presumed powerless to regulate.

As noted above in Part II(A), opinions addressing the "internal management and affairs" of foreign-flag ships construe that phrase to be limited to labor-management relations. Even assuming that this line of authority could be extended beyond the labor-law

context to address the more general topic of safety procedures that workers on common carriers follow to protect their passengers from physical harm, it would still not apply to bar Title III's regulation of architectural barriers on cruise ships. Just as the pricing of cruise tickets does not implicate any issues relating to the management of a cruise ship, neither does the presence or absence of physical barriers in cruise-ship architecture implicate any issues involving labor-management relations aboard a ship.

III. APPLICATION OF TITLE III TO FOREIGN-FLAG CRUISE SHIPS IN UNITED STATES WATERS DOES NOT CONSTITUTE EXTRATERRITORIAL APPLICATION OF FEDERAL LAW.

The court of appeals's conclusion that this case raises concerns about the extraterritorial application of federal law, 356 F.3d, at 648, reflects its misunderstanding about the relief sought and the scope of the opinions on extraterritoriality that it cites. Even though the ships at issue sail internationally, Petitioners do not ask this Court to apply Title III outside of United States territory. Their focus is on the pricing of tickets sold on United States soil and conditions and practices aboard NCL's ships within United States waters.

And, to the extent their claims can be read more broadly, an important safeguard against unreasonable application of Title III—the "readily achievable" caveat on Title III's enforcement—eliminates any extraterritorial-application concerns that may remain. Although such concerns could arise in connection with some applications of Title III, that is no reason to conclude that the statute, as a matter of law, is wholly inapplicable to foreign ships.

Furthermore, the opinions about extraterritoriality upon which the court of appeals relied presume that Congress did not intend to apply federal law in specific foreign countries. To read these

opinions as a basis for presuming that federal law cannot reach foreign-flag cruise ships sailing in American waters would circumvent Congress's clear intent and reduce the United States's ability to enforce its laws within its own territory.

A. The Court of Appeals Misunderstood the Scope of Petitioners' Argument and Disregarded a Built-In Safeguard Against Unreasonable Application of Title III.

Petitioners' live complaint notes that, at the times material to their Title III claims relating to their experiences aboard NCL's ships, those ships sailed "within the waters of the United States." Amended Compl. ¶¶13, 15. In the court of appeals and now in this Court, Petitioners have continued to request enforcement of Title III only on United States land and in its territorial waters. *See* 356 F.3d, at 648; Pet., at 16 (stating that "[t]he relevant conduct occurred entirely within the United States' territorial jurisdiction"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §512 (1987) (explaining that a country's sovereignty over its territorial seas is no less than its sovereignty over its land); *id.* §511 cmt. e (same).

The court of appeals nevertheless viewed this case as posing the question of whether Congress "'place[d] the high seas within the jurisdictional reach'" of Title III, *Spector*, 356 F.3d, at 650 (quoting *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) ("*ARAMCO*")), and raised a concern about the permanence of the architectural alterations to NCL's cruise ships that some portions of Title III would require. *Ibid.*, at 648. Thus, the court suggested that Title III's broad application would have significant extraterritorial effect the moment that one of NCL's Title-III-compliant ships sailed outside of United States waters. *Ibid.* That concern, however, ignores Title III's self-limiting language.

Title III prevents its own enforcement if the particular changes it calls for are not "readily achievable." 42 U.S.C. §12182(b)(2)(A)(iv) (stating that failure to remove architectural and transportation barriers constitutes discrimination within the meaning of Title III only "where such removal is readily achievable"); *id.* §12181(9) (explaining that "[t]he term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense" and listing factors for courts to consider in determining whether an action is readily achievable within the meaning of Title III).

Notwithstanding the express limitations on the geographic scope of Petitioners' claims, the court of appeals based its conclusion partly on the "stark likelihood of conflicts" between the architectural standards that enforcement of Title III would require and those set out in the International Convention for Safety of Life at Sea ("SOLAS"). *Spector*, 356 F.3d, at 647 & n.6. But even assuming that this "likelihood of conflict" between the two sets of standards would result in an actual design conflict (a conclusion even the court of appeals does not reach, *ibid.*), Title III's "readily achievable" safeguard quells concerns about federal law imposing unreasonable requirements on cruise ships that sail internationally.

Moreover, some portions of Title III—such as those preventing discrimination in ticket pricing—raise no concerns whatsoever about the international reach of federal law and consequently may not be displaced to avoid extraterritorial application of Title III. *See supra* Part II(C). But more importantly, no foreign-flag ship is forced to enter United States waters. Like other cruise lines, NCL freely chooses to subject itself to American laws, *Benz*, 353 U.S., at 142—a business decision presumably justified by the substantial profits it earns from American citizens. *See generally* Press Release, Int'l Council of Cruise Lines, Cruise Industry Economic Impact Topped $25 Billion in 2003 (August 24, 2004), *at*

http://www.iccl.org/pressroom/ pressrelease.cfm?whichrel=56 (last visited Nov. 12, 2004).

In short, the broad reach of Title III is appropriately tempered by Congress's recognition of the practical limitations on the changes it theoretically requires. This aspect of the ADA ensures that it will not be applied unreasonably or in ways that conflict with international standards, and it obviates the need for the Court to consider the "thorny regulatory issue" that the court of appeals imagined. *Spector*, 356 F.3d, at 650 & n.10. To prevent enforcement of the readily achievable portions of Title III aboard foreign-flag ships sailing in United States waters simply because other portions of Title III might not be readily achievable would frustrate the expressed will of Congress. *See also supra* Part II(C) (urging that it would be improper to reject all of Petitioners' Title III claims—even those relating to on-land ticket sales and onboard barrier removal—on the ground that a foreign-flag ship retains control over its "internal management and affairs").

B. The Court of Appeals's Reliance on an Opinion Addressing the Application of Federal Law in Overseas Workplaces is Misplaced.

As the *amici* States have already pointed out, the court of appeals failed to recognize that labor-management relations aboard merchant vessels are fundamentally different from vacationers' safety and equal treatment aboard common carriers. *See supra* Part II (explaining why this case neither involves the internal management and affairs of foreign ships nor implicates the "delicate field of international relations" that this Court identified in *Benz* and *McCulloch*). The court of appeals made a similar error in equating foreign-flag vacation cruise ships that carry American passengers with foreign-based American companies that employ American workers.

In reaching its conclusion on the supposed issue of Title III's extraterritorial application, the court of appeals relied heavily on this Court's reasoning in *ARAMCO*. Although *ARAMCO* concerned allegations of discrimination, it did so in a context entirely distinct from the one currently before the Court. *See Stevens*, 215 F.3d, at 1242 (explaining its conclusion that *ARAMCO* is inapposite). In *ARAMCO*, an employee of an American corporation sued his employer for discrimination under Title VII of the Civil Rights Act of 1964 following his discharge from his job at a Saudi Arabian facility. 499 U.S., at 247. After stating background law establishing the presumption against extraterritorial application of federal law, *id.*, at 248, the Court noted that Title VII's "boilerplate 'commerce' language" was dispositively less expansive than another statute's stated application to "all commerce which may lawfully be regulated by Congress." *Id.*, at 252 (quoting *Steele*, 344 U.S., at 284); *see infra* Part I(A)(1) (noting that the key language in the statute at issue in *Steele* corresponds in breadth to the language of 42 U.S.C. §12101(b)).

The Court observed that adopting the employee's position would mean that foreign companies that employed United States citizens would be subject to Title VII—"a result at which even petitioners balk." *ARAMCO*, 499 U.S., at 255. Echoing similar statements in *Benz* and *McCulloch*, the Court noted that extraterritorial application of Title VII "would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Ibid.*

Even setting aside the express limitations on the relief that Petitioners seek and assuming that the court of appeals was correct in its conclusion that this case raises an issue of extraterritorial application of federal law, reliance on *ARAMCO* is unjustified. Like *Benz* and *McCulloch*, *ARAMCO* deals with the regulation of relations between employers and their employees—an area in which

this Court has been appropriately reluctant to impose federal laws on employers in foreign countries. Because Petitioners are not seeking enforcement of Title III beyond the limits of United States territory, and because their claims relate to disability-based discrimination against American vacationers boarding cruise ships from American ports and thus implicate no delicate issues of international relations, neither *ARAMCO* nor the other opinions discussing the extraterritorial reach of a federal labor law on foreign soil applies. Rather, the case concerns solely giving effect to Congress's expressed intent to protect the rights of Americans with disabilities traveling on common carriers on American soil and in American waters.

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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